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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN MASON, et al

PETITIONERS,

v.

THE CONTINENTAL GROUP, INC.,
CONTINENTAL CAN, U.S.A.,
AND THE UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER ERISA CLAIMS FOR VIOLATIONS OF FIDUCIARY DUTY ARE SUBJECT TO THE "EXHAUSTION OF REMEDIES" DOCTRINE.

II. WHETHER PETITIONERS' CLAIMS FOR FRAUD WERE BARRED BY PETITIONERS' FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES UNDER THE LABOR MANAGEMENT RELATIONS ACT.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals Mason v. Continental Group, Inc., 763 F. 2d 1219 (11th Cir. 1985), appears in the Appendix. The opinion of the district court, Mason v. Continental Group, Inc., 569 F. Supp. 1241 (N.D. Ala. 1983), also appears in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on the 21st day of June 1985. A timely petition for rehearing was filed on July 10, 1985, and was denied on the 24th day of July 1985. This Court's jurisdiction is invoked under the Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. § 1001, et seq.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. § 1001, et seq.

STATEMENT OF THE CASE

John A. Mason filed suit on behalf of himself and others similarly situated (hereinafter referred to collectively as "Petitioners") on November 26, 1980, against Respondents, Continental Group, Inc., and Continental Can Company, USA (hereinafter referred to collectively as "Respondent Company") in the Equity Division of the Circuit Court of Jefferson County, Alabama. Petitioners claimed damages for breach of contract, intentional and willful fraud, breach of fiduciary duties resulting from fraudulent representations and omissions of material facts, violation of the Alabama fraud statutes, §§ 6-5-101 through 6-5-104 (Ala. Code 1975), and conspiracy. (R. 5-16)

Both an answer and a petition for removal were

filed on December 29, 1980. (R. 1-19, 22-24) The answer asserted that Petitioners' claims were subject to the grievance and arbitration procedure provided in the collective bargaining agreement and that the Petitioners had failed to exhaust these administrative remedies. Removal was sought on the basis of the original jurisdiction of the District Court for the Northern District of Alabama pursuant to § 301 of the Labor Management Relations Act, Title 29 § 185(a). Petitioners filed a motion to remand which was overruled on February 12, 1981. (R. 25) The complaint was amended on May 8, 1981, by adopting and realleging the averments of the previous complaint and by adding a count claiming damages for violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. (R. 32-33)

Petitioners amended their complaint with leave of court on December 7, 1981, to specifically aver that their claims were not subject to the grievance and arbitration procedures provided in the collective bargaining agreement and to allege that the conduct from which the

Petitioners sought redress was not "related to wage, hours, or conditions of employment." Petitioners also added count eight to the complaint which stated a cause of action against the United Steelworkers of America, AFL-CIO (hereinafter "Respondent Union") for breach of their duty to fairly represent Petitioners and for fraud and conspiracy. (R. 68-70)

Continental Can, U.S.A., one of the respondents herein, was the employer of Petitioners. Petitioners worked for a company owned by Respondent Company in Birmingham, Alabama, known as Plant 411. (Paulson depo. at 14, 15) Plant 411 was a three-piece can manufacturing system which basically dealt with lithographing and the production of can ends. (Paulson depo. at 19) The average age of the employees was forty-one and one-half years, and the average years of employment at Plant 411 was eleven and one-half years. (Rexford depo. at 84) Plant 411 was opened in 1968 or 1969 and ceased operation completely in the third quarter of 1979. (Paulson depo. at 24, 57, 58) Petitioners were represented by the Respondent Union and were

contractually obligated under the Master Agreement between Respondent Continental Can, U.S.A. and Respondent Union under an agreement dated November 1, 1977. Under the contract, Respondent had the right to close a facility for "legitimate reasons" or "economic reasons." (Master Agreement p. 10, Art. 6) (Middleton affidavit at pp. 17, 28)

Can manufacturing technology began to change in 1975. Respondent Company planned a gradual transition of converting three-piece technological plants to two-piece manufacturing process plants or, in the alternative, locating a two-piece plant in the general geographical locations of a previously existing three-piece plant. (Paulson depo. at 19) Beginning in 1975, Respondent knew that Plant 411 was to close because of this change in technology. (Paulson depo. at 19, 20) The decision to close the plants or to convert a three-piece plant to a two-piece plant was of great magnitude to Respondent Company and the strategy of conversion was to be coordinated over several years as testified to by Mr. Glen Alan Paulson, the general manager of the southeast

division of Respondent Company. (Paulson depo. at 21, 22, 24) Respondent Company made a determination to phase out the three-piece system at Plant 411 and construct a two-piece manufacturing process plant in Atlanta, Georgia. The Atlanta plant was, in fact, completed and in operation approximately one year prior to the closing of Plant 411 (Paulson depo. at 34, 35). The opening of the Atlanta plant coordinated with the closing of Plant 411 in Birmingham. (Paulson depo. at 34, 35)

The decision to close Plant 411 was kept secret and confidential from all employees affected by the contract in existence with Respondent Union. Though the decision to close the plant was anticipated and known by Respondent Company from 1975 to 1979, it was not disclosed to the employees affected by the closing until the announcement was made in 1979. (Paulson depo. at 47, 48, 61, 62, 64, 65; Rexford depo. at 67) The decision to close Plant 411 was admittedly kept confidential from the employees because Respondent did not want the employees to know about it. (Rexford depo. at 67)

During the period of time that Respondent Company

was planning the closing, Respondent Company used secret, confidential computerized methods of controlling employee costs known as Bell I and Bell II. (Rexford depo. at 51, 52, 57, 58) The purpose of Bell I was to have available to management an understanding of employee costs and the corresponding ability to minimize employee costs within the perimeters of the contract. (Rexford depo. at 57) Bell I dealt with strategic long-term obligations as an approach to planning and costs while Bell II dealt with operating costs during a calendar year. (Rexford depo. at 59) The purpose of the Bell plan was to be able to project employee costs at various locations at periodic levels and have a better understanding of where committed obligations were and the implications of those obligations, pension liabilities, and other expenses as a basis for business decisions. (Rexford depo. at 44, 45) The Bell plans were confidential documents not to be disclosed to any employees, unions or competitors. Its value to Respondent Company was that it gave an edge in controlling employee costs. (Rexford depo. at 51, 52)

While the decision to close Plant 411 was based on

"economic reasons," (Middleton affidavit at 17, 38), Respondent Company had the option of either laying off the employees of Plant 411 or terminating them. Termination was more expensive because of the necessity of payment of severance pay as compared to paying subsistence pay to laid-off employees. Therefore, Petitioners were "laid off." Yet, no intention ever existed on behalf of Respondent Company of recalling any of the employees who were "laid off" from Plant 411. (Paulson depo. at 73, 74)

The retirement system of Respondent Company was an accumulated point system. Retirement points were based on years of service with Respondent Company added to the age of the employee. The two rules which governed the Petitioners were the "rule of sixty-five" which provided that an employee with twenty years of service as of the last day worked and enough years of age to equal sixty-five points could retire with a normal pension. There was also a "seventy/seventy-five" rule which combined the age of the employee with years of service so that an employee with enough years of service

to equal seventy-five points could retire. Both plans provided fairly substantial job security benefits. (Rexford depo. at 53)

The potential obligations and liabilities of Respondent Company increased for employees who accumulated sixty-five points under the "rule of sixty-five" and the "rule of seventy/seventy-five." (Rexford depo. at 54) By using the Bell plan to consider these potential obligations and liabilities, Respondent Company could control employee costs by closing certain plants and opening others. It was to the benefit and advantage of the Respondent Company to have no employees reach a certain number of years or to accumulate the necessary points for retirement. (Rexford depo. at 58) Employees could retain or receive additional employee benefits by accumulating points which were computed based upon age and years of service. (Rexford depo. at 57) Respondent Company could avoid potential liability to employees by not allowing any of the employees to reach sixty-five points for retirement purposes. (Rexford depo. at 54) It was economically advantageous to Respondent Company,

on a long-range planning basis, to have as many employees as possible with less than sixty-five points. (Rexford depo. at 55)

Additionally, after an employee had worked for Respondent Company for fifteen years, he was entitled to participate in an expanded employment program (EEP) which allowed him a thirteen-week vacation over a five-year period. At the end of the five-year period, he would be entitled to another thirteen-week vacation. (Rexford depo. at 56) As a result, Respondent Company incurred more expenses in providing employees with more than fifteen years of service these additional vacation benefits. (Rexford depo. at 56, 57) Bell II took into consideration the increased costs for employee benefits on the basis of the thirteen-week vacation after an employee had been employed for more than fifteen years. (Rexford depo. at 58) After an employee worked fifteen years for Respondent Company, the costs incurred for that employee increased. (Rexford depo. at 86)

The decision to close Plant 411 was made by Messrs. Olson, Grant, Snider and Paulson. (Paulson depo. at 38,

39) At least one of these, Mr. Paulson, understood that Bell I and II were methods used to keep up with the age, years of service, and sex of the employees to better define the employee costs for purposes of strategic planning. (Paulson depo. at 57, 58) In relying on Bell I and Bell II to make the decision to close Plant 411, Respondent Company attempted to establish a computation of the least costs for employees, taking into consideration all factors of employee costs such as disability income benefits, EEP, overtime expenses, contingency locations, inventory control and seniority systems. In deciding to hire new employees in the Atlanta plant and close the Birmingham plant, Respondent Company made the decision based upon the costs of the expanded employment program, the costs of the seniority system, and the costs of future retirement pension benefits of Plant 411 employees contrasted with the costs of hiring new employees for the Atlanta plant. (Paulson depo. at 76)

The contract with the Respondent Union provided under Article Six "Management Responsibilities" page 10,

that the Plant could be closed for "legitimate reasons," which in the instant case, according to the Respondent Company and Respondent Union were "economic reasons." (Middleton affidavit at 17, 18; Newell Transcript at 7) Thus, filing a grievance with the Union would have been futile when Plant 411 was closed for "economic reasons" unless there had been proof at the time Petitioners were "laid off" that the plant was closed for reasons other than economic reasons. (Newell Transcript at 8) As further evidence of the futility of filing a grievance, Mr. Newell, the union representative, specifically told the employees that there was nothing that could be done through the grievance and arbitration procedure as a result of the plant shut down and that filing a grievance would be futile because the plant closing was due to an economic situation. (Newell Transcript at 9) When the plant was closed, Petitioners were advised by officials of Respondent Union that the plant closing was not an arbitrable matter subject to the grievance and arbitration procedure. Accordingly, there was "nothing that could be done by the Union because the plant was closed for

economic reasons." (Newell Transcript at 7-9)

Respondent Company filed a motion for summary judgment on September 3, 1981, supported by the affidavit of J. C. Middleton. (R. 36-48) The motion for summary judgment was founded on the assertion that the Petitioners lacked standing in that they failed to exhaust the grievance and arbitration proceedings provided for in the collective bargaining agreement, pension plan, and insurance agreement negotiated between the Company and Respondent Union. Respondent Union filed an answer to the complaint as amended on December 23, 1981, (R. 71-76), and on April 27, 1982, Respondent Union filed a motion for summary judgment assigning in support thereto the affidavits of Ralph Gurley and David Newell. (R. 78-92)

Petitioners filed affidavits in opposition to the Respondents' motion for summary judgment. These affidavits set out Petitioners' claims as well as the facts on which the claims were based. (R. 122-178) Petitioners testified that for approximately a five-year period prior to the closing of Plant 411, the plant managers,

executives and supervisors of Respondent Company continued to assure Petitioners that there were no plans to close Plant 411 and that employee benefits, job security, and future of Plant 411 were all secure and would be protected by the Respondent Company as promised. (R. 122-178) Yet plans had been made by Respondent Company as early as 1975 to close the plant and to convert from the three-piece system to a two-piece manufacturing system. (Paulson depo. at 19, 20) The decision to close the plant, though anticipated and known by Respondent Company from 1975 to 1978, was kept confidential from the employees. As a result, the employees remained in place thereby directly benefiting Respondent Company. Respondent Company used executives, managers and supervisors to deceive Petitioners about the eminent closing of the plant and the future job security of Petitioners. (R. 122-178)

The Atlanta plant was opened with new employees who had no seniority and who had a different union with a different contract. The employee cost factor was substantially less for the Atlanta plant than that of Plant

411. The opening of the Atlanta plant was the scheme and design of Respondent Company to lower the cost and expense of Petitioners. (R. 122-178) The representations of plant and job security were false and were known to be false by Respondent Company, and these misrepresentations were relied upon by the Petitioners to their detriment. (R. 122-178)

Summary judgment was granted in favor of both on July 27, 1983. (R. 195) The court issued a separate memorandum opinion on July 27, 1983. (R. 183-194) The district court stated that the Petitioners had failed to comply with the grievance and arbitration procedures provided by their collective bargaining agreement and failed to show an excuse therefor. The opinion also stated that the Petitioners had failed to bring their cause of action for unfair representation against the Respondent Union within the applicable statute of limitations and that the allegations of fraud and conspiracy were unsupported by the facts. The opinion also stated that the Respondent Company was entitled to be dismissed from the lawsuit because the Petitioners had failed to comply with the

grievance and arbitration procedures provided in the collective bargaining agreement and had failed to show an excuse for this noncompliance.

Petitioners filed a notice of appeal on August 25, 1983. (R. 196) The Eleventh Circuit Court of Appeals affirmed the judgment of the trial court on the 21st day of June 1985. A timely petition for rehearing was timely filed on the 10th day of July 1985. This petition was denied on July 24, 1985.

REASONS FOR GRANTING WRIT

I. THE ELEVENTH CIRCUIT ERRONEOUSLY HELD THAT PETITIONERS' ERISA CLAIMS WERE SUBJECT TO THE "EXHAUSTION OF REMEDIES" DOCTRINE. THIS HOLDING IS IN DIRECT CONFLICT WITH THE HOLDING OF THE NINTH CIRCUIT.

The Eleventh Circuit in its opinion in the instant case, Mason v. Continental Can, 763 F.2d 219 (11th Cir. 1985), held that Petitioners were required to exhaust their remedies under a pension plan agreement before they could bring claims involving violations of ERISA's statutory provisions in federal court. In so holding, the

Eleventh Circuit agreed with the Seventh Circuit's holding in Kross v. Western Electric Company, 701 F.2d 1238 (7th Cir. 1983), but is in direct conflict with the Ninth Circuit which reached a contrary conclusion in Amaro v. Continental Can Company, 724 F.2d 747 (9th Cir. 1984). The Ninth Circuit in Amaro rejected the reasoning of the Kross decision and held unequivocally that such claims of statutory violations are not subject to an "exhaustion of administrative remedies" doctrine.

Petitioners respectfully contend that the reasoning of the Amaro decision is consistent both with the statutory language of ERISA and its legislative history. "Under the conference agreement, the participant may bring a civil action against any person who interferes with his rights which are protected under the Act." H. R. Conf. Rep. No. 93-1280, 93d Cong., Second Session, reprinted in 1974 U. S. Code Cong. and Admin. News, pp. 5038, 5110. The Eleventh and Seventh Circuits, however, have held that despite the fact that the text of ERISA does not mention an exhaustion requirement, one should be imposed by the courts.

The Ninth Circuit in Amaro, held that the exhaustion of arbitration procedures was not required prior to bringing a statutory claim under ERISA. The claim brought against the defendant, Continental Can Company, in the Amaro decision was very similar to the claim brought against Respondent Company in the instant case. The complaint in Amaro alleged that the company had laid off employees to prevent them from obtaining the number of years of continuous service required to qualify under the pension and welfare plans. As noted by the Ninth Circuit, ERISA does not mandate or even recommend an internal appeals procedure for claims which fall within the protection offered by ERISA. Further, the court noted that resolution of claims under ERISA involves statutory interpretation which is a task for the court and not for an arbitrator. 724 F. 2d at 751 (citing Alexander v. Gardner-Denver Company, 415 U.S. 36 (1975)). In the words of the Amaro decision, "judicial procedures are more capable of safe-guarding individual statutory rights than are arbitral procedures. . . . 'Arbitrators very often are powerless to grant the

aggrieved employees as broad a range of relief,' [Alexander and Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728, 745, 101 S. Ct. 1437, 1477 (1981)], as is available under ERISA." 724 F. 2d at 752.

In the Alexander opinion, the court ruled that Title VII plaintiff should be allowed to pursue an action at law after having lost a parallel contractual claim in arbitration. While his collective bargaining agreement barred the very racial discrimination of which he complained, the court set down the generally acknowledged principle that labor arbitration is an inappropriate form for the enforcement of minimum substantive rights and guarantees. The Court drew a vital distinction between a contractual and a statutory right: a contractual right is the product of the "majoriterian process of collective bargaining" which "may be exercised or relinquished" by the collective bargaining agent; a statutory right, however, confers minimum, non-negotiable rights to individuals. ERISA provides such minimum, non-negotiable guarantees to the beneficiaries of pension plans. These rights are therefore statutory.

Statutory rights, unlike contractual rights, are not subject to the grievance procedures of employment contracts.

The Supreme Court has not limited the holding of Alexander to Title VII actions. In Barrentine, the court held that an employee seeking to enforce a Fair Labor Standards Act claim in federal court need not exhaust a grievance or arbitration procedure. The court stated as follows:

> Not all disputes between an employee and his employer are suited for a binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitrable decision when the employees' claim is based on rights arising out of a collective bargaining agreement, different considerations apply where the employees' rights arise out of a statute designed to provide minimum substantative guarantees to individual workers.

450 U.S. at 737 (emphasis added)

A long line of cases have held that various statutory claims are not subject to the doctrine of exhaustion. For example, in McKinney v. Missouri-Kansas-Texas Railroad Company, 357 U.S. 265 (1958), the court held that the plaintiffs were not required to pursue arbitration procedures prior to asserting a statutory claim for seniority rights under the Universal Military Training and

Service Act. In U. S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971), the plaintiffs were not required to pursue grievance procedures to enforce their statutory rights to wages under the Seaman's Wage Act.

This Court has expressed a strong policy that only federal courts may decide if a federal statute has been violated. To entrust this decision to a private administrative body is inconsistent with the holdings of this Court and the language of ERISA. In enacting ERISA, Congress sought to set forth "uniform national standards for employee benefit plans and to provide for uniform remedies in the enforcement of the plans." Dependahl v. Falstaff Brewing Corporation, 653 F. 2d 1208, 1215 (8th Cir. 1981); Authier v. Ginsberg, 757 F. 2d 796 (6th Cir. 1985).

It should be noted that the ERISA claims involved in this case did not arise from a claim for benefits which had been denied. The claims procedure of the ERISA section relied upon by Respondents in the courts below in its argument that Petitioners did not exhaust their administrative remedies, 29 U.S.C. § 1132(2), was

designed for a denial of claim benefits and does not in any way relate to the Petitioners' claims for breach of fiduciary duties and the fraudulent use of the pension plan. Therefore, the claims procedure provided for by this section was inapplicable and need not have been exhausted prior to bringing suit in federal court.

The pension plan also contained an appeals procedure for participants whose claims for benefits had been denied. (R. 47) The procedure of the pension plan, Section 6 states as follows:

> Any difference that may arise between you and the company concerning your application for, your entitlement to, or the amount of payment of a lump sum retirement allowance, pension or deferred benefit, may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement. . . .

(R. 47) (emphasis added) The appeals procedure contained in this paragraph was designed to resolve differences relating to the application of, entitlement to, or amount of benefit payments. The Petitioners' claims for breaches of fiduciary duty in the fraudulent use of the pension plan do not relate to an "application for, entitlement to, or amount of benefit payments." Therefore, the Petitioners'

claims were not covered by the appeals procedure provided for in the plan.

Respondents have relied in the courts below upon Scheider v. United States Steel Corporation, 486 F. Supp. 211 (W.D. Pa. 1980); Taylor v. Bakery and Confectionary Union, 455 F. Supp. 816 (E.D. N. C. 1978); Amato v. Bernard, 618 F. 2d 559 (9th Cir. 1980); and Lucas v. Warner Swasey Company, 475 F. Supp. 1071 (E.D. Pa. 1979). These cases, however, all involve a direct denial of an employee's claim for pension benefits.

Reliance upon Scheider and Taylor is misplaced. Scheider and Taylor required the plaintiffs to submit their claims involving applications for and denials of pension plan benefits to arbitration. There are no applications for benefits in the present fact situation. The opinion in Allied Pilots Association v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. Cir. 1980) is more analagous to the instant situation. The court in the Airline Pilots Association case held that contractual pension plan claims had to be arbitrated but claims for statutory breaches of fiduciary duties under ERISA do not have to be arbitrated. This is

precisely the Petitioners' contention. In Gavalik v. Continental Can Company, CV 81-1519 (W.D. Pa. 1982), the court applied the principles of Alexander and Barrentine in an action charging defendant Continental Can with violations of ERISA. In this opinion, the court distinguished Scheider on the grounds that Scheider did not involve a claim to secure statutory rights protected by ERISA. Rather, Scheider involved a claim to secure pension benefits provided for by the pension plan. In another opinion, this Court reviewed this decision, Gavalik v. Continental Can, CV 82-1995 (W.D. Pa. 1983) and again affirmed the decision that a claim for breach of fiduciary duty does not have to be arbitrated.

The instant case involves instead a claim for the breach of fiduciary duties under ERISA and the fraudulent use of a pension plan. The District Court opinion relied heavily upon the decision of Amato v. Bernard, 618 F. 2d 559 (9th Cir. 1980). The District Court, however, did not fully explore the ramifications of the Petitioners' claims under ERISA as is apparent from the casual treatment of Petitioners' claims. While the court in Amato did hold

that an employee is required to exhaust administrative procedures as set forth in ERISA, it should be noted that the plaintiff in Amato sought judicial relief for the denial of his application and claim for pension benefits. Petitioners are not seeking relief from such a denial. Rather, Petitioners are seeking relief from a violation of fiduciary duties and obligations imposed under ERISA.

The Amato opinion actually provides support for Petitioners' position that the claims are not subject to exhaustion of administrative procedures by the distinction made in the Amato opinion of Lewis v. Merrill-Lynch, Pearce, Fenner & Smith, Inc., 431 F. Supp. 271 (E.D. Pa. 1977). The court in Amato distinguished Lewis on the grounds that the plaintiff in Amato did not present a claim for violation of the fiduciary responsibilities imposed by ERISA. Amato, 618 F. 2d at 568 n. 10. Lewis involved claims that Merrill-Lynch had violated fiduciary responsibilities to the pension plan. While the defendants argued that the plaintiff had failed to exhaust his administrative remedies as set out in an agreement to arbitrate ERISA claims, the court ruled that the

agreement to arbitrate did not compel the plaintiff to submit ERISA claims to arbitration which charged a violation of fiduciary responsibilities.

The court in Lewis noted that ERISA itself prohibits an agreement which purports to relieve a fiduciary from responsibility or liability for any obligation or duty under ERISA. 29 U.S.C. § 1110. Further, 29 U.S.C. § 1132 grants participants in a pension plan the right to file a civil action to redress a fiduciary's breach of responsibilities. Reading § 1110 and § 1132 in conjunction renders any agreement which mandates that claims for breach of fiduciary duty be submitted to an arbitration procedure void as against public policy. 431 F. Supp. at 276.

The court in Amaro v. Continental Can, 724 F. 2d 747 (9th Cir. 1984) noted that there is no appeal procedure "either mandated or recommended by ERISA to cure these claims." 724 F. 2d at 751. The court also noted that statutory interpretation is a task for the judiciary. Id. at 751-52 (citing Alexander v. Gardner-Denver Company, 415 U.S. 36, 57 (1974)). The court in

Amaro went on to rely also on Barrentine v. Arkansas--Best Freight System, Inc., 450 U. S. 728 (1981). In Barrentine, the Court held that arbitration did not foreclose bringing a case involving the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The court noted that the reasoning of both the Barrentine and Alexander decisions placed realistic limitations on the arbitration process when that process conflicts with non-waivable statutory rights. The court noted that the judicial process is more "capable of safe-guarding individual statutory right than are arbitral procedures." 724 F. 2d at 752.

Petitioners' complaint describes a statutory violation. It charges that Respondents were guilty of violations of § 510 of ERISA which prohibits discrimination intended to prevent employees attainment of benefits under an employee benefit plan. 29 U.S.C. § 1140. Congress intended that ERISA remedy a broad range of problems in the field of employee benefit plans. To subject ERISA to doctrines such as the "exhaustion of administrative remedies" doctrine is, in effect, to limit the remedies provided by the statute and in violation of

the stated purpose of ERISA. The House of Representatives' committee on education and labor noted as follows:

> Underlying the provisions of this Act is a recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, the consequences of lack of adequate vesting, but also with the broad spectrum of questions such as adequacy of funding, plant shut downs, and plant terminations, adequate communications to participants, and, in short, the establishment of certain minimum standards to which all private pension plans must conform if a private pension promises to become real rather than illusory.

H. R. Rep. No. 533, 93d Cong. 2d Sess., reprinted in 1974 U. S. Code Cong. and Admin. News 4639, 4647-48. To hold that ERISA claims are subject to the exhaustion of remedies doctrine, would not result in conformity of pension plans to the minimum standards noted by Congress in these comments. The very purpose of ERISA was to assure equitable foundations of employee benefit plans and safe guarding the interest of plan participants. 29 U.S.C. § 1001(a). See also, LeFebre v. Westinghouse Electric Corporation, 549 F. Supp. 1021 (D.C. Md. 1982); Gilliam v. Edwards, 492 F. Supp. 1255 (D.C. N. J. 1980). To hold that the interests of plan participants are to be

subjected to arbitration procedures that will vary from procedure to procedure, is to defeat the very purpose of ERISA.

II. THE COURTS BELOW ERRED IN HOLDING THAT PETITIONERS' CLAIMS WERE BARRED AS A RESULT OF PETITIONERS' FAILURE TO FAILURE TO EXHAUST THEIR ADMINISTRATIVE REMEDIES UNDER THE LABOR MANAGEMENT RELATIONS ACT.

The District Court granted summary judgment against Petitioners on their fraud claim holding that it was barred because Petitioners had not submitted this claim to the grievance and arbitration procedures set forth in the collective bargaining agreement. Mason v. Continental Group, Inc., 569 F. Supp. 1241, 1245 (N.D. Ala. 1983). The Eleventh Circuit held likewise. Mason v. Continental Group, Inc., 763 F. 2d 1219 (11th Cir. 1985). The Petitioners' fraud claim was predicated on the fact that Respondent Company fraudulently misrepresented to the Petitioners that there were no plans to close the plant in Jefferson County, Alabama when specifically asked by Petitioners if the rumors concerning the closing of the plant were true. See Affidavit of L. G. Robertson (R.

122-124) The Respondent Company had already made a decision to close the plant at the time the misrepresentations were made. (Paulson depo. at 19-20) To determine whether the Petitioners' fraud claim was required to be submitted to the grievance and arbitration procedure, the District Court should have made a determination whether the language of the collective bargaining agreement was broad enough to require the claim to be submitted to that procedure. As this Court stated in United Steelworkers v. Warrior Gulf and Navigation Company, 363 U.S. 574 (1960) "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 363 U.S. at 582. Both the District Court and the Circuit Court erred in summarily holding that the Respondent Company's decision to close the plant, as well as the Respondent's fraud in telling the Petitioners that the plant would not be closed, were subject to the grievance and arbitration procedures.

A claim for tort damages such as that of the Petitioners is not subject to a grievance and arbitration

requirement of a collective bargaining agreement in the absence of an explicit statement requiring arbitration of tort claims. In Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584, 539 F. 2d 598 (2nd Cir.), cert denied, 385 U.S. 832 (1966), an employer filed suit for tort damages claiming that the union had induced employees of a neutral employer to engage in work stoppages in an effort to cause the employer to stop doing business with Old Dutch Farms, Inc. The union filed a motion to stay the lawsuit pending arbitration of the damage claim on the ground that the claim fell within the ambit of the general arbitration clause contained in the collective bargaining agreement. The court held, however, that a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. 359 F. 2d at 600 (citing United Steel Workers of America v. Warrior Gulf and Navigation Company, 363 U.S. 574 (1960)). Stated another way, the Court found that a tort claim is not subject to arbitration unless there is an explicit statement in the collective bargaining contract directing arbitration of a claim for tort

damages.

The Fifth Circuit adopted the same rule in Vulcan Materials Company v. United Steel Workers of America, AFL-CIO, 430 F. 2d 446 (5th Cir. 1970). In that case, Vulcan Materials Company brought suit against the defendant-union claiming damages arising out of an alleged secondary boycott. The union filed a motion to stay the proceedings pending arbitration pursuant to the collective bargaining agreement. The Fifth Circuit rejected the union's argument stating as follows:

> This matter is controlled by Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Union, Second Circuit 1966, 359 F. 2d 598, 603, cert denied, 385 U.S. 832, 87 S.Ct. 71, 17 L.Ed. 2d 67, where it was held in a § 303 suit where arbitration was sought under a broad arbitration clause that
>
> > [A]bsent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under § 303 in that the parties did not intend to withdraw such disputes from judicial scrutiny.

430 F. 2d at 458.

Under Vulcan Materials Company and Old Dutch Farms, Inc., both the district court and the Eleventh

Circuit in the instant case should have addressed the question of whether an explicit agreement existed in the bargaining agreement requiring Petitioners to file a grievance and seek arbitration of tort claims. Article 13 of the collective bargaining agreement reveals that there is no such requirement. (R. 19)

Petitioners admit that one count of the initial complaint sought recovery for breach of the collective bargaining agreement. The bulk of Petitioners' claims, however, seek recovery for verbal misrepresentations made to Petitioners. Petitioners have alleged that employees of the Respondent Company represented to Petitioners that there were no plans to close the plant. Yet while these representations were being made, plans had already been negotiated for the closing of the plant. (R. 122-23) In reliance upon the misrepresentations, Petitioners continued to work at the Respondents' plant rather than seek other employment. As redress for the fraud perpetrated upon them, Petitioners sought, among other things, compensatory damages for mental anguish and punitive damage, neither of which are available under

the grievance and arbitration provisions of the collective bargaining agreement. The fact that an employee is entitled to a remedy which can only be secured by litigation is a fact which courts have considered in holding that the employee was not required to exhaust administrative remedies prior to filing suit. Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3rd Cir. 1968); Fruit and Vegetable Packers and Ware. Local 760 v. Morley, 378 F.2d 738 (9th Cir. 1967).

This Court held in First National Maintenance Corporation v. National Labor Relations Board, 452 U.S. 666 (1981), that an employer's decision to shut down part of its business enterprises for economic reasons is not part of the "terms and conditions as set forth in § 8D of the National Labor Relations Act, 29 U.S.C. § 8(d). Therefore, the company is not required to bargain over its decision to terminate one of its operations. The Eleventh Circuit held in Weather Tamer, Inc. v. National Labor Relations Board, 676 F.2d 843 (11th Cir. 1982) that a failure to bargain over a closing is not a violation of the National Labor Relations Act. Weather Tamer was a

manufacturer of children's clothing with plants located in Columbia, Tennessee, Lewisburg, Tennessee, Athens, Alabama and Tuskegee, Alabama. The Eleventh Circuit followed the decision of the Supreme Court in First National Maintenance Corporation v. NLRB stating that a decision to close a plant is not part of the "terms and conditions" over which Congress has mandated bargaining. 676 F. 2d at 493.

The Petitioners' causes of action brought pursuant to Alabama's fraud statutes are likewise not preempted by the National Labor Relations Act. Pursuant to this Court's holding in Belknap v. Hale, _____ U.S. _____ 103 S. Ct. 3172 (1983), the Petitioners' claims for common law fraud were not preempted. In Belknap, the Court stated:

> Our cases have announced two doctrines for determining whether state regulations or causes of action are preempted by the NRLA. Under the first, set out in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed. 2d 775 (1959), state regulations and causes of actions are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. Id. at 245, 79 S. Ct. at 779. The state regulation cause of action may, however, be sustained if behavior to be regulated is behavior that is only peripheral concern to the federal law or touches interest deeply rooted in local feeling and responsibility. Id. at 243-244, 79 S. Ct. at 778-779;

> Sears, Roebuck and Co. v. Carpenters, 436 U.S. 180, 200, 98 S. Ct. 1745, 1759, 59 L. Ed. 2d 209 (1978); Farmer v. Carpenters, 430 U.S. 290, 296-297, 97 S. Ct. 1056, 1061, 51 L. Ed. 2d 338 (1977). In such cases, the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the board's ability to adjudicate controversies committed to the Act, Farmer v. Carpenters, supra., at 297, 97 S. Ct. at 1061; Sears, Roebuck and Co. v. Carpenters, supra., 436 U.S. at 200, 98 S. Ct. at 1759, and the risk that the state will sanction conduct that the Act protects. Id. at 205, 98 S. Ct. at 1761. The second preemption doctrine, set out in Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 398 (1976), prescribes state regulation and state law causes of action concerning conduct that Congress intended to be unregulated, Id. at 140, 96 S. Ct. at 2553, conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes. Id. at 147-148, 96 S. Ct. at 2556-2557.

_____ U. S. at _____, 103 S. Ct. at 3176-3177 (1983). In Belknap, the Court addressed the issue of whether strike replacements, who were displaced by reinstated strikers after having accepted jobs which were represented to them as being permanent and receiving assurances from the company that they would not be fired to accommodate returning strikers, could maintain common law causes of action for fraud and breach of contract. Under federal labor law, if an employee engages in an economic strike, the employer may hire permanent

replacements, and he need not discharge the strike replacements if the strikers offer to return to work unconditionally. If the strike, however, is an unfair labor practice strike, the employer must discharge replacements in order to accommodate returning strikers.

The Court found that the State of Kentucky had a substantial interest in protecting its citizens from misrepresentations that caused its citizens grievous harm. The Court noted that the "injury remedy by the state law has no relevance to the Board's function and that the Board can award no damages, impose no penalty, or give any other relief to the plaintiffs in this case." Pursuant to the tests set out in San Diego Building Trades Council v. Garmon, the Court found that the state interest involved clearly outweighed any possible interference with the Board's function that would result from permitting the action for misrepresentations perceived. _____ U.S. at _____, 103 S. Ct. at 3183.

Similarly, the State of Alabama has a substantial interest in protecting its citizens from the fraudulent misrepresentations made to Petitioners in this action, the

State interest involved in the fraudulent misrepresentations outweighs any peripheral concerns, if any, addressed by the NLRA.

The holding in Belknap is consistent with earlier holdings of this Court. In Linn v. Plant and Guard Workers, 383 U.S. 53 (1966), this Court held that false and malicious statements made in the course of a labor dispute were actionable under state law if injurious to reputation even though such statements were in themselves unfair labor practices adjudicable by the board. In Farmer v. Carpenters, 430 U.S. 90 (1977), the Court likewise held that the Act did not preempt a state action for intentionally inflicting emotional distress even though a major portion of the actionable conduct consisted of unfair labor practices. In Sears, Roebuck and Co. v. Carpenters, 436 U.S. 180 (1978), the Court held that a state trespass action was permissible and not preempted since the action concerned only the location of the picketing while the arguable unfair labor practice focused on the object of the picketing.

Even if the lower courts had been correct in their

holding that Petitioners were subject to the collective bargaining agreement and the grievance procedures set forth therein, Petitioners were excused from exhausting their remedies under this agreement because such procedures would have been futile. In Glover v. St. Louis-San Francisco Railway Company, 393 U.S. 324 (1969), this Court recognized an exception to the general rule that an employee must exhaust his administrative remedies before asserting a breach of contract claim if the administrative procedure would have been wholly futile. Petitioners, after having made numerous complaints to officials of Respondent Union, also felt that any grievance procedure would have been futile as did the union officials. (R. 122, 123; Tr. 7-9) This exception has also been recognized by the Fifth Circuit. See Ramsey v. Signal Delivery Service, Inc., 631 F.2d 1210 (5th Cir. 1980); Fulton Lodge No. 2 IAM v. Nix, 415 F.2d 212 (5th Cir. 1972); Calagaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962).

Substantial evidence was presented to the trial court that the Petitioners' claims to the union would have

been futile. Respondent Union admitted that such claims would have been futile in the testimony of the union official, Mr. David L. Newell. (Tr. 7, 8, 9) Petitioners were advised by officials of Respondent Union that the plant closing was not an arbitrable matter subject to the grievance and arbitration procedures. When Petitioners tried to determine from Respondent Union what, if anything, could be done to protect their rights and to remedy the situation, Petitioners were advised that there was nothing that could be done. (Robertson's affidavit, R. 122, 123)

Ralph Gurley, staff representative of the Respondent Union, in his affidavit in support of the motion for summary judgment, stated in paragraph four as follows: "As with all collective bargaining agreements I am familiar with, the collective bargaining agreement referred to above does not prohibit the company from exercising its right to shut down its operation at any particular plant." (Gurley affidavit, R. 81). At the time the plant was closed, the employees were advised by Respondent Union officials, consistent with this affidavit

and statements set forth in oral hearing before the district court that the plant closing was not an arbitrable matter subject to the grievance and arbitration procedure. When the employees tried to determine from the Respondent Union what could be done, they were informed that nothing could be done. If officials of Respondent Union themselves stated that the Respondent Company had every right to shut down the plant and told employees that there was nothing that could be done to remedy the situation, to require the employees to exhaust the grievance and arbitration procedure would have been futile as admitted by an official of Respondent Union, Mr. Newell. (Tr. 9) The question of whether it would have been futile to submit Petitioners' claims to the grievance procedure was, at least, a question of material fact which made the summary judgment entered by the district court and affirmed by the court of appeals improper.

CONCLUSION

Petitioners respectfully request that this Court

grant the petition for writ of certiorari to the Circuit Court of Appeals for the Eleventh Circuit. As grounds therefor, Petitioners state that the holding of the Eleventh Circuit in the instant case is inconsistent with the holding of the Ninth Circuit with regard to whether claims brought under ERISA for violations of fiduciary duty are subject to the "exhaustion of administrative remedies" doctrine. Further, Petitioners respectfully contend that the holding of the Court of Appeals for the Eleventh Circuit was erroneous in that it stated that Petitioners' tort claims were barred by the exhaustion of remedies doctrine under the Labor Management Relations Act. Further, filing of such grievances would have been futile as shown by the evidence presented in this case.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition has been served upon counsel for all parties in this cause by mailing a copy of the same to their office addresses by regular United States mail, postage prepaid, this the 22nd day of October, 1985, as follows: Mr. Sidney Frazier, Cabaniss, Johnston, Gardner, Dumas & O'Neal, 1900 First National-Southern Natural Building, Birmingham, Alabama 35203; Mr. Jerome A. Cooper, Cooper, Mitch and Crawford, Suite 201, 409 North 21st Street, Birmingham, Alabama 35203. I further certify that in accordance with Rule 28.2, this Petition was deposited in a United States Post Office box with first-class postage prepaid and properly addressed to the Clerk of the Supreme Court within the time allowed for filing; to-wit: October 22, 1985.

J. Usty Yearout

J. Usty Yearout

Jack J. Hall

Jack J. Hall

85-847

Supreme Court, U.S.
FILED
OCT 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. ____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1985

JOHN MASON, et al

PETITIONERS,

v.

THE CONTINENTAL GROUP, INC.,
CONTINENTAL CAN, U.S.A.
AND THE UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC,

RESPONDENTS

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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763 F.2d 1219

JOHN MASON, III, et al.,
Plaintiffs-Appellants,
v.
CONTINENTAL GROUP, INC., et al.,
Defendants-Appellees.
No. 83-7479.
United States Court of Appeals,
Eleventh Circuit.
June 21, 1985.

Former employees brought suit against their former employer alleging breach of contract, intentional and willful fraud, breach of state law fiduciary requirements and a violation of their statutory rights under the Employee Retirement Income Security Act. Employees also brought suit against their union alleging a breach of the duty of representation and conspiracy to defraud. The United States District Court for the Northern District of Alabama, 569 F. Supp. 1241, Lynne, J., granted summary

judgment for both employer and union, and employees appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) having agreed to such a broad arbitration clause, former employees were bound to submit to the grievance and arbitration process their state law fraud claims, which were based on allegations that employer closed its Alabama plant in order to avoid employment obligations to its employees after having induced employees to continue working on the representation that the plant would remain in operation; (2) former employees were not excused from pursuing their wrongful termination claims under collective bargaining agreement where they failed to establish the futility of doing so; and (3) former employees were required to exhaust their remedies under pension plan agreement before they could bring their claims involving violations of ERISA's statutory provisions in federal court.

Affirmed.

1. Labor Relations 416.1

Employees claiming breach of a collective bargaining agreement or wrongful termination of employment by their employer are bound by that agreement's terms providing a method for resolving disputes between them and their employer.

2. Labor Relations 416.1

When employees asserting an arbitrable grievance have not attempted to utilize the dispute resolution machinery available to them under collective bargaining

agreement, their independent suit against the employer must be dismissed.

3. Labor Relations 416.1

Having agreed to such a broad arbitration clause, former employees were bound to submit to the grievance and arbitration process their state law fraud claims, which were based on allegations that employer closed its Alabama plant in order to avoid employment obligations to its employees after having induced employees to continue working on the representation that the plant would remain in operation.

4. Labor Relations 416.1

Test for "futility" in submitting claim to arbitration is not whether the employees' claims would succeed, but whether employees could have availed themselves of the grievance procedure.

5. Labor Relations 416.1

Former employees were not excused from pursuing their wrongful termination claims under collective bargaining agreement where they failed to establish the futility of doing so.

6. Labor Relations 416.1

Former employees were required to exhaust their remedies under pension plan agreement before they could bring their claims involving violations of ERISA's statutory provisions in federal court. Employee Retirement Income Security Act of 1974, §§ 502(a)(3), 503, 510, as amended, 29 U.S.C.A. §§ 1132(a)(3), 1133, 1140.

J. Gusty Yearout, Birmingham, Ala. for plaintiffs-appellants.

Robert H. Stroop, Jr., Jerome A. Cooper, Birmingham, Ala., for United Steelworkers of America, AFL-CIO.

Sydney F. Frazier, Jr., Birmingham, Ala., for Continental Group.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY and ANDERSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

RONEY, Circuit Judge.

Plaintiffs, former employees of Continental Can Company, claim the company closed its Alabama plant in order to avoid employment obligations to its employees, after having induced plaintiffs to continue as employees on the representation that the plant would remain in operation. They brought a suit against the company alleging breach of contract, intentional and willful fraud, and breach of state law fiduciary requirements, and against the union alleging a breach of the duty of representation and conspiracy to defraud. Plaintiffs also assert a violation of their statutory rights under the

Employee Retirement Income Security Act of 1974 ("ERISA").

The district court, 569 F. Supp. 1241 (D.C. Ala. 1983) granted summary judgment for both the employer and the union, holding that plaintiffs' remedy lay in the grievance and arbitration procedures of the collective bargaining agreement, and that failure to exhaust those remedies foreclosed this litigation. We affirm.

The appeal raises issues as to (1) whether the company's alleged conduct is subject to the collective bargaining agreement, (2) if so, whether plaintiffs should be excused from exhausting remedies provided in that agreement; (3) whether the state law cause of action for breach of fiduciary duty is preempted by the National Labor Relations Act; (4) whether ERISA claims are subject to pension plan appeals procedures; and (5) whether Continental Can was a fiduciary under ERISA and subject to the duties imposed by the Act.

The decision of the first two issues turns on the collective bargaining agreement in force at the time. Since we hold that the claims should have been submitted to arbitration, we need not decide the third point, whether the state law breach of duty claim is preempted by the Labor Relations Act. The fourth and fifth points require an analysis of ERISA, but there too, we decide that exhaustion of administrative remedies must precede a court suit.

Plaintiffs, thirty-six employees at Continental Can's

Plant No. 411 in Fairfield, Alabama, until the plant was closed on December 21, 1979, were at all times relevant to this case members of the collective bargaining unit represented by the United Steel Workers of America, AFL-CIO, subject to the collective bargaining agreement, insurance agreement, and pension plan entered into between Continental Can and the union. Because of changes in can manufacturing technology, in 1975 Continental Can began planning for gradual transition that would eventual ly result in the closing of Plant No. 411 in 1979 and the concurrent opening of a new plant in Atlanta, Georgia. Continental Can first announced the closing of Plant No. 411 to the employees in September 1979, two months before the event actually occurred. Layoffs of employees continued over the next two months, and the plant ceased operations on December 21, 1979.

Plaintiffs originally filed this action against Continental Can in state court on November 16, 1980. They claimed damages "for wrongful termination, for the deprivation of employee benefits, pension retirement benefits, comprehensive employee benefits, seniority rights, [and] mental anguish" resulting from the closing of Plant No. 411. They alleged that Continental Can, prior to the closing announcement, had made various fraudulent misrepresentations that they would have continuous employment with Continental Can until they reached retirement age as long as they performed their

jobs satisfactorily. They contended that these and other misrepresentations induced them to continue their employment at the plant even though they would have obtained other jobs had they known Continental Can's intentions of closing down the plant and terminating their employment.

Predicating federal jurisdiction on section 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185, Continental Can removed the case to federal district court and moved for summary judgment on the grounds that plaintiffs' grievances were arbitrable under the collective bargaining agreement and that they had made no effort to resolve their claims through the grievance and arbitration procedures provided in that agreement. Plaintiffs subsequently amended their complaint twice. First, plaintiffs added the ERISA claims against Continental Can, alleging that Continental Can had terminated their employment out of a desire to interfere with plaintiffs' attainment of rights and benefits under the comprehensive benefit program administered by Continental Can. Second, plaintiffs added the union as a party defendant, alleging that the union had breached its duty of fair representation owed to the plaintiffs by failing to file and prosecute plaintiffs' claims through the grievance and arbitration procedures, and that the union had conspired with Continental Can to deprive the plaintiffs of their rights under the collective bargaining agreement. The union also moved for summary judgment.

On July 27, 1983, the district court granted both defendants' motions for summary judgment. As to the union, the court held that plaintiffs' claims were barred by the applicable six month statute of limitations. Plaintiffs do not appeal that decision.

As to the Company, the district court held that notwithstanding the state law fraud claims, the plaintiffs' complaints fell within the scope of the grievance and arbitration provisions. The court determined that it was "incumbent upon plaintiffs to attempt, unless otherwise excused, to present their complaints concerning 'fraud' and breach of some 'contract' other than the collective bargaining agreement through the grievance mechanism...." The court considered and rejected plaintiffs' arguments that they were excused from resorting to those procedures because it would have been futile. The court went on to find that an exhaustion of remedies requirement barred plaintiffs' ERISA claims because they had not invoked the arbitration procedures provided by the pension plan agreement.

Exhaustion of Remedies Under
Collective Bargaining
Agreement

[1,2] Employees claiming breach of a collective bargaining agreement or wrongful termination of employment by their employer are bound by that agreement's terms providing a method for resolving disputes between them and their employer. Hines v.

Anchor Motor Freight, Inc., 42 U.S. 554, 563, 96 S. Ct. 1048, 1055, 4 L.Ed. 2d 231 (1976); Vaca v. Sipes, 386 U.S. 171, 184-85, 87 S. Ct. 903, 913-14, 1 L.Ed. 2d 842 (1967). When employees asserting an arbitrable grievance have not attempted to utilize the dispute resolution machinery available to them under the agreement, their independent suit against the employer must be dismissed. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 85 S. Ct. 614, 13 L.Ed. 2d 580 (1965).

[3] It is undisputed that the plaintiffs have never initiated a grievance against Continental Can concerning the closing of Plant No. 411 or any misrepresentations made prior to the announcement of the closing. Plaintiffs contend, however, that their state law fraud claims under the Alabama fraud statute are separate and independent from the collective bargaining agreement. Ala. Code §§ 6-5-101 to -104 (1977).

In United Steelworkers of America v. Warrior & Gulf Navigation Co. 363 U.S. 574, 80 S. Ct. 1347, 4 L.Ed. 2d 1409 (1960) the Supreme Court provided guidance for determining when disputes are arbitrable under a collective bargaining agreement. The question is whether the reluctant party did agree to arbitrate the grievance. The Court directed that the arbitration provisions of an agreement should be broadly construed to encompass all claims that the employees have been terminated wrongfully and deprived of benefits guaranteed by the agreement unless the subject of the dispute is clearly

excluded from the grievance procedure. Id. at 582-83, 80 S. Ct. at 1352-53. Questions of arbitrability are left to the arbitrator if there is a clear demonstration that the parties so intended. Id. at 583 n. 7, 80 S. Ct. at 1353 n. 7.

The grievance and arbitration provisions in the collective bargaining agreement between Continental Can and the union were quite broad.

> 13.1 Purpose
>
> The purpose of this Article is to provide an opportunity for discussion of any request or complaint and to establish a procedure for the processing and settling of grievances, as defined in Section 13.2.
>
> 13.2 Definition
>
> A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with the Agreement respecting wages, house, or conditions of employment. Any dispute over whether the complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein.

Section 13.2 clearly supports the district court's decision that plaintiffs were required to submit to arbitration the question of whether the definition of "grievance" included a complaint concerning alleged misrepresentations made by Continental Can with regard to the closing of Plant No. 411. Having agreed to such a broad arbitration clause, plaintiffs are bound to submit arguably extrinsic claims, such as fraud, to the grievance and arbitration

process. Cf. International Union of Operating Engineers, Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491-92, 92 S. Ct. 1710, 1712-13, 32 L.Ed. 2d 148 (1972) (laches defense submitted to arbitral process where agreement to arbitrate extends to "any difference").

In holding that plaintiffs could not separate their fraud claims from the collective bargaining agreement, the district court relied heavily on its prior decision in Reese v. Mead Corp., 79 Lab.Cas. (CCH) ¶ 11,732 (N.D. Ala.1975), aff'd mem., 529 F. 2d 1350 (5th Cir. 1976). In Reese, plaintiff employees claimed their employer had deprived them of seniority and pension rights by misrepresentations on which plaintiffs had decided whether to elect certain options under the collective bargaining agreement or to remain on layoff. Plaintiffs claimed that their reliance on these misrepresentations regarding their future employment gave rise to a cause of action based on the Alabama fraud statutes. As in the current case, none of the plaintiffs had attempted to institute the grievance procedures under the governing collective bargaining agreement. The court granted summary judgment for the employer, stating that given federal labor policies and the broad arbitration clause in the agreement, "it would seem entirely inappropriate to conclude that employees could cast aside the contract grievance procedure by merely alleging that statements made by the employer amounted to fraud." 79 Lab.Cas. (CCH) ¶ 11,732, at 22,005.

Plaintiffs argue that the fraud claims in Reese were

different because the seniority and pension rights of which the workers were allegedly deprived were "predicated on the collective bargaining agreement." Plaintiffs contend they are not seeking enforcement of a collective bargaining agreement, but asking for relief for the loss of the right "to seek gainful and secure employment and build four years seniority elsewhere rather than continue their work at defendant's plant." The misrepresentations in Reese, however, allegedly affected the employees' election to accept a severance allowance coupled with termination of employment rights under the contract rather than to continue their layoff status in hopes of further employment with their employer at other locations. Had the Reese plaintiffs taken the layoff option, they could have continued to build seniority at a new location, much like the plaintiffs in the current case claim they would have done at a new place of employment.

In Redmond v. Dresser Industries, Inc., 734 F. 2d 633 (11th Cir. 1984), this Court determined that an employee's breach of contract, fraud, outrage and bad faith claims all derived from his layoff by his employer and concerned rights arising under the collective bargaining agreement. There plaintiff attempted to claim both a separate individual employment agreement created by certain alleged representations made by his superiors which later turned out to be untrue and an employment agreement under the collective bargaining agreement. The plaintiff

was held to be barred from bringing suit because of his failure to attempt to follow the grievance procedures set out in the collective bargaining agreement. Id. at 634-35. See also Fristoe v. Reynolds Metals Co., 615 F. 2d 1209, 1212 (9th Cir. 1980) (rejecting plaintiff's contention that complaint alleged only common law causes of action and construing complaint as alleging breach of a collective bargaining agreement); Schwartz v. R. C. Motor Lines, Inc., 434 F. Supp. 785, 787 (E.D. Va. 1977) (applying exhaustion requirement over plaintiff's objections that complaint alleged fraud and deception on the part of the employer).

Plaintiffs argue that since a decision to shut down a plant for economic reasons does not fall within an arbitration clause covering "wages, hours and conditions of employment" under First National Maintenance Corp. v. NLRB, 452 U.S. 666, 101 S. Ct. 2573, 69 L.Ed. 2d 318 (1981), and Weather Tamer, Inc. v. NLRB, 676 F. 2d 483 (11th Cir. 1982), a cause of action for fraudulent concealment and misrepresentation of that decision would not be covered. We disagree. First, those decisions involve questions of statutory interpretation, not contract interpretation. First National Maintenance holds that the employer's decision to close down a plant is not one of the "terms and conditions of employment" under section 8(d) of the National Labor Relations Act ("NLRA") which are mandatory subjects of bargaining under NLRA § 8(a)(5). Weather Tamer merely holds that the employer was not

guilty of closing down the plant for the purpose of discouraging union activity, citing First National Maintenance for the proposition that the employer can indeed shut down the plant for economic reasons without consulting the union. 676 F. 2d at 493.

Second, the plaintiffs do not base their cause of action on the decision to close the plant, but on management relations to plaintiffs which are conceptually separate from the closing of the plant.

[4,5] Plaintiffs argue that even if the contract grievance provisions are found to cover the issues they raise, they were excused from pursuing their claims under the collective bargaining agreement because to do so would have been "wholly futile." Plaintiffs contend that they were advised by union officials that the plant closing was not arbitrable and therefore to require plaintiffs to exhaust their contract remedies would have been "futile." The test for "futility" is not, however, whether the employees' claims would succeed, but whether the employees could have availed themselves of the grievance procedure. Republic Steel Corp. v. Maddox, 379 U.S. at 659, 85 S. Ct. at 619. The district court notes that the employees had two months between the closing announcement and the plant shutdown during which they had "full opportunity to raise claims concerning the closing of the plant" or the alleged misrepresentations.

This case is a bit different from any cited. The argument is that having induced the plaintiffs to continue

their employment at the Alabama plant on false representations that the plant would remain open, the employer is liable to its employees when the plant is closed, and that this claim is not encompassed in the collective bargaining agreement. In analysis, however, the claim is for termination of employment, wrongful because the employer had represented the employment would continue. Wrongful termination of employment is grist for the arbitration mill in collective bargaining agreements. Simply characterizing the claim as a tort claim rather than a breach of contract claim is insufficient to take it out of the policy that such disputes are subject to arbitration. Plaintiffs have shown no reason to excuse the failure to pursue the remedies available to them under the collective bargaining agreement.

Exhaustion of Remedies Under Pension Plan Agreement

Around 1976 Continental Can developed and began using a computerized data base known as Bell I, which listed certain basic information on all its employees. Continental Can used Bell I in conjunction with a computer program known as Bell II to enable it to measure the current and long term employee costs of its operations. The resulting information was used for both current and future planning purposes. The existence and use of Bell I and Bell II were kept confidential.

Plaintiffs contend that Continental Can's use of Bell I and Bell II constituted violations of various ERISA

provisions. They allege that the programs enabled the company to compare its Plant No. 411 employee costs attributable to the seniority and pension systems then in effect with the costs associated with the proposed Atlanta plant using workers with less seniority. Plaintiffs argue that the confidential use of those programs by Continental Can violated Continental Can's fiduciary duties to its employees under 29 U.S.C.A. §§ 1104 and 1106, that the failure to disclose the plans violated the reporting and disclosure requirements imposed by 29 U.S.C.A. §§ 1022 and 1024, and that plaintiffs' termination by Continental Can constituted unlawful interference with protected employee rights under 29 U.S.C.A. § 1140.

Continental Can responds that plaintiffs failed to raise the fiduciary duty claims in the district court and that these claims are therefore foreclosed. Because plaintiffs' complaint only stated a cause of action for wrongful termination, Continental Can contends that the fiduciary duty claims cannot be raised on appeal. Plaintiffs first raised their ERISA claims in an amendment to their complaint on May 8, 1981. The amended complaint charged that Continental Can, as plaintiffs' "employer" under 29 U.S.C.A. § 1002(5), had "violated the provisions of 29 U.S.C.A. § 1001, et seq. by unlawfully terminating plaintiffs' employment" and that Continental Can had "terminated plaintiffs because of [its] desire to interfere with the attainment of rights

[and] benefits of plaintiffs under the plan." Plaintiffs now contend that these general allegations coupled with the original complaint's specific averment of a fiduciary relationship between Continental Can and its employees were sufficient to preserve the fiduciary duty claims for appeal. Continental Can does concede that plaintiffs' amended complaint stated a cause of action for wrongful termination under 29 U.S.C.A. § 1140 and that plaintiff had argued that theory in district court. For purposes of addressing the exhaustion argument, we assume without deciding that plaintiffs' fiduciary duty claims were sufficiently presented to the trial court.

[6] The district court concluded that plaintiffs' ERISA claims were barred due to their failure to exhaust their remedies under the pension plan agreement. Plaintiffs contend that an exhaustion requirement should only be applied to applications for or denials of benefits under the plan and not to claims involving violations of ERISA's statutory provisions, such as 29 U.S.C.A. § 1140, which provides:

> It shall be unlawful for any person to discharge ... a participant or beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled to under the plan ...

Plaintiffs' allegations state a claim under this section which may be enforced through a civil action under section 502 of ERISA:

> (a) A civil action may be brought—

> (3) by a participant beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; ....

29 U.S.C.A. § 1132(a)(3). This section, however, is silent with regard to whether exhaustion is to be required before these claims are brought in federal court.

ERISA requires that every employee benefit plan "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim: 29 U.S.C.A. § 1132(2). In accordance with that section, the pension plan before us contains an appeals procedure.

> Any difference that may arise between you and the Company concerning your application for, entitlement to or the amount of payment of a lump sum retirement allowance, pension or deferred benefit may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement beginning at step 3 of the Grievance Procedure, except as provided in the Medical Review Procedure described in this Booklet.
>
> If any such grievance is appealed to arbitration in accordance with such provisions, then the arbitrator, insofar as is necessary to the determination of such grievance, has authority only to interpret and apply the provisions of the Pension Agreement. He does not have authority in any way to alter, add to or subtract from any of such provisions, and his decision on any such grievance which is properly referred to him is binding on you, the Company, and the Union. The Company and the

> Union share equally the costs of the arbitrator's charge and fees, along with any other expenses which they may mutually agree to incur.

The "Master Agreement" referred to in the pension plan provisions is the collective bargaining agreement, which provides specific steps and instructions for pursuing a grievance complaint. Although the plan states that differences "may be taken up as a grievance," similar ostensibly permissive language in a collective bargaining agreement has been held to require exhaustion of administrative remedies before commencement of a lawsuit. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 658-59, 85 S. Ct. 614, 619-20, 13 L.Ed. 2d 580 (1965) ("Use of the permissive 'may' does not of itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation.)

The question is whether plaintiffs' claim for breach of defendants' fiduciary duties and fraudulent use of the pension plan claims grounded in statutory provisions of ERISA, should have been brought first through the plan's appeals procedures. In Kross v. Western Electric Co., 701 F. 2d 1238 (7th Cir. 1983), the Seventh Circuit applied an exhaustion requirement to alleged violations of statutory rights under ERISA. The plaintiff had brought a class action alleging that Western Electric had discharged its employees for the purpose of preventing their attainment

of vested status in the company pension plan in violation of 29 U.S.C.A. § 1140. The court held that the employees' failure to exhaust their administrative remedies under the pension plan barred their statutory claim. Id. at 1245. Although plaintiff in Kross argued as have plaintiffs in the current case, that exhaustion should apply only to violations of the provisions of a particular pension plan and not to claims involving ERISA itself, the court dismissed that argument, stating that "well-established federal policy, and supporting case law, favoring exhaustion of administrative remedies prior to bringing an ERISA based lawsuit in federal court" overrode plaintiffs' contention. Id.; see also King v. James River-Pepperell, Inc., 592 F. Supp. 54, 56 (D. Mass 1984); Delisi v. United Parcel Service, Inc., 580 F. Supp. 1572, 1575 (W.D. Pa. 1984).

The Ninth Circuit has reached a contrary conclusion in Amaro v. Continental Can Co., 724 F. 2d 747 (9th Cir. 1984). In Amaro, the Ninth Circuit rejected the exhaustion requirement for ERISA claims where the claim arises from an alleged statutory violation rather than a breach of contract. In so doing, the court distinguished its prior decision in Amato v. Bernard, 618 F. 2d 559, 567-68 (9th Cir. 1980).

In Amato v. Bernard, the court had concluded that plaintiffs' ERISA claims were barred due to their failure to exhaust their remedies under the pension plan agreement. The court held the exhaustion requirement

applied to an employee who sought a declaration of the parties' rights and duties under a pension plan subject to ERISA. Id. at 568. The court noted that the text of ERISA does not mention an exhaustion requirement. Id. at 566. Nevertheless, the court determined that the legislative history of ERISA indicated that Congress had intended for the courts to apply an exhaustion requirement. The court further reasoned that section 503 of ERISA, 29 U.S.C.A. § 1133, which requires pension plans to provide administrative procedure for persons whose claims have been denied, also suggests that claims should be exhausted through those procedures before being brought in court. As further support for its holding, the Amato v. Bernard court noted that prior interpretations of the pension plan made during the administrative process would later assist a reviewing court.

We agree with the Seventh Circuit and the Amato v. Bernard decision of the Ninth Circuit. Compelling considerations exist for plaintiffs to exhaust administrative remedies prior to instituting a lawsuit. Administrative claim resolution procedures reduce the number of frivolous lawsuits under ERISA, minimize the cost of dispute resolution, enhance the plan's trustees; ability to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decision making process and allow prior fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated. See Kross, 701 F. 2d at 1244-45; Amato v. Bernard, 618 F. 2d 559,

567-68 (9th Cir. 1980). In addition, imposing an exhaustion requirement in the ERISA context appears to be consistent with the intent of Congress that pension plans provide intrafund review procedures. 29 U.S.C.A. § 1133; see also H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U. S. Code Cong. & Ad. News 4639, 5038, 5108.

We therefore hold that the district court did not err in holding that plaintiffs must exhaust their remedies under the pension plan agreement before they may bring their ERISA claims in federal court.

AFFIRMED.

569 F. Supp. 1241

JOHN A. MASON, III, et al., Plaintiffs.

v.

CONTINENTAL GROUP, INC., et al., Defendants.

Civ. A. No. CV80-L-1730-S.

United States District Court, N.D. Alabama, S.D.

July 27, 1983.

Employees brought breach of contract action against employer and breach of fair representation action against union. On motion to dismiss, the District Court, Lynne, Senior District Judge, held that: (1) claims were barred for failure to pursue grievance procedure, and (2) statute of limitations had run on any claim of breach of duty of fair representation.

Judgment for defendants.

1. Labor Relations 434.8

Collective bargaining agreement which defined grievance as any difference between local management and the union or employees as to the interpretation or application of the contract with respect to wages, hours, or conditions of employment was broad enough to encompass claims of employees that they had been wrongfully denied benefits provided by the contract when plant was closed, despite employees' claim that they

based their claims on fraudulent misrepresentations rather than breach of the collective bargaining agreement.

2. Labor Relations 416.1

It was incumbent upon employees who claimed that they were deprived of benefits to which they were entitled when plant was closed to present their complaints through grievance mechanism before maintaining court action for breach of contract or violations of ERISA. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 101 et seq.; Labor Management Relations Act, 1947, § 302(a), 29 U.S.C.A. § 195(a).

3. Labor Relations 434.8

Grievance provisions of collective bargaining agreement applied to dispute arising out of owner's decision to close plant.

4. Labor Relations 416.3

If employee can establish that his union breached its duty of fair representation in the handling of his grievance, union's breach of duty relieves the employee of express or implied requirement that disputes be settled through contractual grievance procedures.

5. Labor Relations 416.1

Contention that pursuit of grievances by individual employees would have been futile because there was no grievance or arbitration procedure available after plant had closed did not excuse employees from pursuing the grievance remedies before maintaining court action where

the plant remained open for over two months between the announcement of the closing and the actual closing.

6. Labor Relations 416.1

Employees were not excused from pursuing grievance procedures before maintaining court action for breach of contract on theory that employer had repudiated contractual procedures by closing plant.

7. Labor Relations 416.1

In the absence of any evidence of conspiracy between union and employer, employees were not excused from pursuing grievance procedures before maintaining breach of contract action against employer.

8. Labor Relations 416.1

Allegation of employees that they could not obtain punitive damages through grievance procedure did not excuse them from pursuing grievance procedures before maintaining breach of contract action against employer.

9. Limitation of Actions 46(7)

Employees' cause of action for breach of contract following closing of plaint arose at or near the time of the plant closing for limitations purposes.

10. Limitation of Actions 95(1)

Where employer filed answer to breach of contract complaint on December 29, 1980, asserting that employees' claims were subject to grievance and arbitration procedures, employees should have been aware at that time of the grievability of their claims despite

their contention that they did not discover that their complaint was subject to grievance until August 3, 1981. 11. Labor Relations 416.1

Once it is concluded that employees can maintain no action against union for breach of its duty because of the bar of the statute of limitations, the breach no longer furnishes an excuse for failure to resort to the grievance mechanisms before pursuing a claim against the employer.

Jerry O. Lorant, J. Gusty Yearout, Lorant, Harris & Yearout, P.C., Birmingham, Ala., for plaintiffs.

William F. Gardner, Sydney F. Frazier, Jr., Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, Ala., for defendants.

MEMORANDUM OPINION

LYNNE, Senior District Judge.

This action has been submitted to the Court on the defendants' motions for summary judgment. Defendants are the United Steelworkers of America, AFL-CIO (hereinafter "the Union"), and the Continental Group, Inc., together with its operating division, Continental Can Company, U.S.A. (hereinafter collectively referred to as "Continental"). Plaintiffs are individuals who were employed by Continental at its Plant No. 411 in Fairfield, Alabama, until the plant was closed on December 21, 1979. At all times relevant to the allegations of the

complaint, plaintiffs were member of the collective bargaining unit represented by the Union and were subject to a written collective bargaining agreement, insurance agreement and pension plan entered into between Continental and the Union.

This action was originally filed in state court, Continental being the only defendant specifically identified in the complaint, and was removed by Continental to this court. Jurisdiction is predicated upon the provisions of § 301 of the Labor Management Relations Act, 29 U.S.C. §185(a). After Continental moved for summary judgment on the ground that plaintiffs have made no attempt to resolve their claims through the grievance and arbitration provisions contained in the collective bargaining agreement, insurance agreement and pension plan, the plaintiffs amended their complaint with leave of court to add the Union as a defendant and to assert claims against the Union, including a claim for breach of the duty of fair representation, principally based upon the Union's failure to prosecute plaintiffs' complaints through the grievance and arbitration procedure.

In their original complaint against Continental, plaintiffs claimed damages "for their wrongful termination, for the deprivation of employee benefits, pension retirement benefits, comprehensive employee benefits, seniority rights, [and] mental anguish" resulting from the closing of Plant No. 411. They allege:

> [Continental] as employer of plaintiffs, continuously throughout said employment and prior thereto, represented to and agreed with plaintiffs, that plaintiffs would have continuous employment with [Continental] until plaintiffs reached the age of 65 or until plaintiffs became otherwise eligible to receive full retirement and other benefits under a comprehensive benefit program as long as plaintiffs performed their respective jobs in a satisfactory manner. [Continental] further represented and promised additional employee benefits including, but not limited to, extended vacation after employment with [Continental] for ten years.

Plaintiffs contend that Continental breached its agreement by terminating their employment, that the termination gives rise to a cause of action under the Alabama fraud statutes, see Ala. Code §§ 6-5-101 to 104 (1975), and that Continental conspired with others to defraud plaintiffs. Plaintiffs also contend that Continental violated the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 101 et seq., by terminating plaintiffs' employment out of a desire to interfere with plaintiffs' attainment of rights and benefits under a comprehensive benefit program administered by Continental.

In their amendment to the complaint adding the Union as a defendant, plaintiffs contend that the Union

breached its duty of fair representation by (a) failing to provide a reasonable grievance and arbitration procedure for plaintiffs upon the termination of their employment; (b) failing to prepare and prosecute grievances; (c) failing and refusing to make available to plaintiffs administrative remedies provided under the collective bargaining agreement; (d) conspiring with Continental for the plant's shutdown; and (e) conspiring with Continental to terminate plaintiffs' employment without first submitting the proposed plant shutdown through the contractual grievance procedure. Aside from their claim for breach of the duty of fair representation, plaintiffs contend that the Union and Continental conspired to deprive them of their rights provided for in the collective bargaining agreement and other rights by planning to shut down the plant without providing a grievance and arbitration procedure before and after the termination of plaintiffs' employment.

I. Continental's Motion for Summary Judgment (Herein of Grieving the Death of a Plant)

Continental moves for summary judgment on the basis of plaintiffs' failure to attempt to resolve their claims through the grievance and arbitration provisions of the collective bargaining agreement. It is undisputed that no plaintiff initiated a grievance relating to the company's actions in closing Plant No. 411. Equally undisputed is the principle of law set forth in Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965):

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf.

379 U.S. at 652-53, 85 S.Ct. at 616 (footnotes and citations omitted). In response, plaintiffs argue that the claims they assert in this action are not within the scope of the grievance and arbitration procedure and that, in

any event, under the circumstances they were excused from the requirement that they first resort to that procedure.

The provisions for the settlement of disputes in the contract establish a four-step grievance procedure culminating in arbitration and preceded by the following relevant language:

> 13.1 Purpose.
>
> The purpose of this Article is to provide an opportunity for discussion of any request or complaint and to establish a procedure for the processing and settling of grievances, as defined in Section 13.2.
>
> 13.2 Definition
>
> A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with this Agreement respecting wages, hours, or conditions of employment. Any dispute over whether a complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein.

Also relevant is the description of the first step in the grievance procedure:

> Within thirty (30) calendar days after wrong complained of was supposed to have happened or started to exist (but if the employee did not find out about the wrong immediately, he will be allowed

thirty (30) calendar days after he reasonably should have found out about it to file the grievance) the employee, with a Grievance Committeeman or Steward, or if he so desires, alone, talks over the grievance with his Supervisor in a sincere effort to settle the problem. This does not preclude the handling of group grievances. (Emphasis added).

[1] There can be little doubt that the grievance and arbitration provisions of the contract in question are sufficiently broad to encompass plaintiffs' claims that they have been wrongfully denied benefits provided by the contract. Plaintiffs' contention that, because they base their claim not on a breach of the collective bargaining agreement but rather on fraudulent misrepresentations and the breach of obligations created by those representations, their claims were not grievable was rejected by this Court in the closely analogous case of Reese v. Mead Corporation, 79 Lab.Cas. (CCH), 11,732 (N.D. Ala. 1975), aff'd mem., 79 Lab.Cas. (CCH), 11,733 (5th Cir. 1976). There the plaintiffs, who had elected under a collective bargaining agreement to receive a severance allowance upon the closing of one of defendant's furnaces at which they worked rather than electing to remain in layoff status, claimed that the defendant deprived them of seniority and pension rights by misrepresenting certain facts on the basis of which plaintiffs made the decision to elect the severance option.

In response to the plaintiffs' argument that their claims based upon fraud could be maintained independently of the collective bargaining agreement, the Court stated:

> In the present case former employees are complaining that statements made by their employer in and about the application of the collective bargaining agreement resulted in a denial of certain benefits that plaintiffs would not have had but for that agreement. The Court concludes that notwithstanding the "fraud" label applied by plaintiffs, the seniority and pension benefit claims are sufficiently bound up in the collective bargaining agreement between [defendant] and the Union to require the application of federal labor law principles recognized in Republic Steel, supra.

As in Reese, plaintiffs' attempt in the present case to separate their claims from the collective bargaining agreement is without merit.

[2] This Court in Reese also addressed the principles for determining the breadth of a grievance and arbitration procedure:

> Having concluded that federal labor policies control this dispute, the Court cannot then escape the strict standards for interpreting the scope of collectively bargained arbitration clauses set out in United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960): there must be either an "express provision

excluding a particular grievance from arbitration" or "the most forcefull evidence of a purpose to exclude the claim form arbitration." 363 U.S. at 585, 80 S.Ct. at 1354.

This Court went on to note the rule established by the Supreme Court for doubtful cases:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Warrior & Gulf Navigation Co., 363 U.S. at 582-583, 80 S.Ct. at 1353 (footnotes omitted) (emphasis added). As in Reese, where this Court concluded the grievance procedure in the present case applies to "the interpretation of application of or compliance with" the terms of the agreement. The contract in this case also goes further to define a grievance to include any dispute as to whether a complaint is subject to the grievance procedure. In addition, both the insurance agreement and pension plan contain appeal procedures which state that any differences that may arise under those plans "may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement...." Under these provisions and the principles discussed in Reese, it was incumbent upon plaintiffs to attempt, unless otherwise excused, to present their complaints concerning

"fraud" and breach of some "contract" other than the collective bargaining agreement through the grievance mechanism as required in Republic Steel. That exhaustion of remedies requirement is likewise applicable to plaintiffs' claims based upon ERISA. Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980).

[3] Plaintiff's attempt to escape the "strict standards" applicable to such provisions by arguing that the grievance procedure was designed to handle individual disputes with local management and not disputes concerning a corporate decision to close a plant. See Schneider v. Electric Auto-Lite Co., 456 F.2d 366 (6th Cir. 1972) (grievance procedure applicable to disputes "between the foreman and any employee" held inapplicable to disputes arising out of the permanent shutdown of the employer's plant). Given the broad sweep of the provisions at issue in this case, which are much broader than the language at issue in the decision in Schneider upon which plaintiffs rely, the argument is unconvincing. Particularly noteworthy in this connection is the following statement contained in Step 1 of the grievance procedure: "This does not preclude the handling of group grievances." Furthermore, the argument appears to be foreclosed by the decision in Republic Steel, where the Supreme Court found a grievance procedure applicable to an employee's claim for severance pay arising out of a decision to close a mine.

[4] Given that plaintiffs' complaints are within the scope of the grievance and arbitration provisions, they must establish some excuse for failing to attempt to invoke the procedure established in those provisions in order to avoid summary judgment in favor of Continental. It is now well settled, of course, that if an employee can establish his union breached its duty of fair representation in the handling of a grievance, the Union's breach of duty "relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures." Hines v. Anchor Motor Freight, 424 U.S. 554, 567, 96 S.Ct. 1048, 1058, 47 L.Ed.2d 231 (1976); see Vaca v. Sipes, 386 U.S. 171, 185-186, 87 S.Ct. 903, 914-915, 17 L.Ed.2d 842 (1967). Thus, if plaintiffs can avoid summary judgment in favor of the Union on their breach of the duty of fair representation claim, a matter discussed in Part II below, Continental's motion must likewise be denied. In addition to the Union's alleged breach of duty, plaintiffs contend they were excused from resorting to the contractual mechanisms because: (1) any attempt to pursue a grievance would have been futile since "there was no grievance and arbitration procedure remaining subsequent to the termination of plaintiffs' employment," amendment to complaint, Paragraph 39; (2) Continental had repudiated the grievance and arbitration procedure; (3) the claim that the company and the Union conspired to deprive plaintiffs of certain rights could not be

adequately resolved through the grievance procedure since the union would have to prove its own wrongful conduct; and (4) the plaintiffs' claims for punitive damages could not be resolved through the grievance and arbitration procedure since an arbitrator would have no authority to award such damages.

In response to plaintiffs' argument that pursuing grievances would have been futile, Continental asserts that the principle established by the Supreme Court in Maddox "completely forecloses" this line of attack:

> Finally, Maddox suggests that it was not possible for him to make use of the grievance procedure, the first step of which called for a discussion within 30 days of his discharge with his foreman, because a mine that has permanently closed has no foreman—indeed, no employees of any kind. This causistic reading of the contract cannot be accepted. The foreman did not vanish; and it is unlikely that the union grievance procedure broke down within 30 days of Maddox' discharge. In any event, the case is before us on stipulated facts; in neither the facts nor the pleadings is there any suggestion that Maddox could not have availed himself of the grievance procedure instead of waiting nearly three years and bringing a court suit.

Republic Steel Corp. v. Maddox, 379 U.S. at 659, 85 S.Ct. at 619-20. While the Court is unwilling to hold categorically that the above quotation from Maddox

"completely forecloses" plaintiffs' argument, the undisputed facts establish its fatal flaw.

[5] In support of plaintiffs' assertion that pursuit of grievances would have been futile based on the absence of any grievance or arbitration procedure after the plant had closed, several plaintiffs have submitted identical affidavits stating that "we were also advised at the closing of the plant that we should not return to the premises which made it impossible to process any grievance and arbitration procedures should they have been available." However, the undisputed evidence is that the announcement of the plant closing was first made in September of 1979, over two months before the event actually occurred (Gurley Affidavit, ¶ 3). On October 11, 1979, the Union held a meeting with all the employees to discuss the closing yet no claim was raised by any plaintiff or other employee concerning a company promise of continued employment and benefits (Newell Deposition, pp. 13-15, 17-18). Thereafter, a company and union representative met with each individual employee to review the plant closing provisions of the union contract and to discuss the benefits and options available to each employee who was being laid off (Middleton Deposition, pp. 30-31). Layoffs of employees occurred over a two month period in October and November, and on December 21, 1979, the plant ceased operations (Gurley Affidavit, p. 5).

Under the foregoing circumstances it appears that the plaintiffs had full opportunity to raise claims concerning the closing of the plant with company and union representatives with whom they were meeting on that very subject. Had the plaintiffs in fact continuously received promises of lifetime employment and benefits as alleged in the complaint, it seems clear that questions or complaints could have been raised during the two month period following the company's announcement of the breach of these promises. Moreover, according to Continental's Human Resources Manager, Joe Middleton, employees from the plant have in fact filed grievances concerning employee benefits long after the plant closed, those grievances being handled through the staff representative of the Union (Middleton Deposition, pp. 43-46). Therefore, even when the Court fully credits the plaintiffs' statements to the effect that they were told not to return to the plant after it had closed, such evidence does not create a genuine issue of material fact as to whether there was an available and continuing avenue for the filing of grievances directed to any aspect of the plant closure. See Republic Steel Corp. v. Maddox, supra.

[6,7] The second and third excuses plaintiffs set forth—Continental's repudiation of the grievance mechanism and its conspiracy with the Union—appear to lack a factual basis. The Supreme Court noted in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d. 842

(1967), that an employee need not pursue the remedial procedures established by contract "when the conduct of the employer amounts to a repudiation of those contractual procedures." Id. at 185, 87 S.Ct. at 914. The Court did not elaborate upon what amounts to repudiation but the concept is inapplicable to the present case. Plaintiffs also cite two decisions suggesting that where employees complain of a conspiracy between their employer and their union, their complaints need not be submitted as a grievance. Lusk v. Eastern Products Corp., 427 F.2d 705,708 (4th Cir. 1970); see Battle v. Clark Equipment Co., 579 F.2d 1338, 1345 (7th Cir.1978). Plaintiffs have pointed to no evidence in the depositions or file in support of their conspiracy charge. A careful examination of such depositions has revealed none. The Union has submitted affidavits from two of its officials who were responsible for representing plaintiffs, however, which assert that they have not had any discussion or understanding with Continental or its representatives concerning the rights of the plaintiffs or any other bargaining unit employees to use the grievance procedure, other than discussions in which Continental informed them it was availing itself of the right to close the plant pursuant to the collective bargaining agreement. (Affidavit of Ralph Gurley, ¶ 8; affidavit of David Newell, ¶ 5). The conspiracy charge has no basis in the facts.

[8] The fourth excuse proffered by plaintiffs—that they could not obtain the relief they sought, namely,

punitive damages, through the grievance procedure—is nothing more than a make weight argument.

II. The Union's Motion for Summary Judgment

[9,10] The Union has moved for summary judgment with respect to the claims asserted against it on the grounds that (1) plaintiffs' claims are barred by the applicable statute of limitations, and (2) plaintiffs' claims are unsupportable in light of the undisputed facts. Plaintiffs' claim against the Union for breach of its duty of fair representation is based principally upon their assertions that they were advised at the time of the plant closing by Union officials that the shutdown was not an arbitrable matter subject to the grievance and arbitration procedure. (Plaintiffs' affidavits in opposition to defendants' motions for summary judgment). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). Assuming that the Union conduct of which plaintiffs complain amounted to such a breach, it seems clear that the cause of action arose at or near the time of the closing of the plant on December 21, 1979. Applying the six month limitations period prescribed by § 10(b) of the National Labor Relations Act, 29 U.S.C. § 106(b), to plaintiffs' claims, DelCostello v. International Brotherhood of Teamsters, et al., No. 81-2386 (decided June 8, 1983), plaintiffs' claim would be barred since the Union was not added as a defendant until December 7, 1981, when the Court

allowed plaintiffs to so amend their complaint. Plaintiffs, however, argue that the limitations period did not begin to run until they knew or should have known that the Union's alleged statements concerning the grievability of the shutdown were false. According to plaintiffs, they did not discover until August 3, 1981, that their complaint was allegedly subject to the grievance procedures. That assertion is patently erroneous. On December 29, 1980, Continental filed its answer to the complaint along with its petition for removal, both of which asserted that plaintiffs' claims were subject to the grievance and arbitration procedure. Furthermore, the identical affidavits submitted by several plaintiffs, assert: "I do not feel my claim is subject to the grievance and arbitration procedure of the collective bargaining agreement. I did not discover that this might conceivable be subject to the grievance and arbitration procedure until the company filed its answer to our complaint in which they set out as a defense that we had not complied with the grievance and arbitration procedure." Since the Union was not added as a defendant until more than six months following December 29, 1980, which is the latest date on which the six-month limitations period began to run, their claim against the Union for breach of its duty of fair representation is barred.

[11] One it is concluded that the employee can maintain no action against the Union for breach of its duty because of the bar of the statute of limitations,

such a breach no longer furnishes an excuse for failure to resort to the grievance mechanisms before pursuing a claim against the employer. "When the six-month period of § 10(b) has passed, the employee should no longer be able to challenge the alleged breach of duty by his Union, and as this is a precondition for maintaining the contract action, he should not be able to challenge the employer's action either." United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 69, 101 S.Ct. 1559, 1567, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring in the judgment) (footnotes omitted). Since the Union is entitled to summary judgment with respect to the claimed breach of duty of fair representation on the basis of the statute of limitations, the company is also entitled to summary judgment since plaintiffs' failure to resort to the grievance mechanism was not excused as appears hereinabove.

Both motions for summary judgment will be granted by separate order.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT GAVALIK, et al.,
Plaintiffs,

vs. Civil Action No. 81-1519

CONTINENTAL CAN COMPANY,
Defendant.

MEMORANDUM OPINION

BLOCH, District J.

This action charges that the defendant manipulated plaintiffs' length of employment in order to deprive them of certain pension benefits. Continental Can awards a pension to employees who have attained 20 years of continuous service and whose age and years of service total at least 65 and less than 75. Specifically, the complaint alleges that the defendant closed a division of its West Mifflin plant so as to lay the plaintiffs off prior to their 20 years of service. Furthermore, the complaint alleges that the defendant continued thereafter to meet its production needs by working the employees overtime, rather than calling plaintiffs back.

This action is brought pursuant to § 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140, which provides, "It shall be

unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary...for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefits plan]."

Defendant has filed a motion to dismiss for plaintiffs' failure to exhaust the grievance procedure set forth in Section 7 of the Pension Agreement between the defendant and the United Steelworkers of America, the collecting bargaining agent of plaintiffs. Section 7 provides:

> "If, during the terms of this Agreement, any differences shall arise between the Company and any employee who shall be an applicant for the lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences...may be taken up as a greivance..."

First, we do not believe that the plaintiffs' claim falls within the terms of the above-quoted provision since they are, at this time at least, neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension. Second, and perhaps more importantly, we believe that § 510 of ERISA has conferred on plaintiffs a statutory right independent of the collective bargaining agreement, which may be enforced in court independent of the grievance procedure.

In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1973), the Supreme Court held that an individual's right to equal employment opportunity under Title VII was independent of an employee's non-discrimination rights under a collective bargaining agreement, and that an employee's initial resort to the grievance procedure did not preclude a later court action. The Court noted the drawbacks to submitting a statutory dispute to arbitration. These included the fact that an arbitrator is an expert in "the law of the shop, rather than the law of the land," Id. at 57. Furthermore, arbitrable fact finding is not usually equivalent to judicial fact finding; the rules of evidence usually do not apply; the record of the arbitration proceedings is not complete and

discovery, compulsory process, cross-examination, and testimony under oath are often limited or unavailable.

Similarly, in Barrentine v. Arkansas-Best Freight System, Inc., __U.S.__, 101 S.Ct. 1437 (1981), the Court concluded that an employee's right to minimum wages under the Fair Labor Standards Act, 29 U.S.C. § 201, et. seq., was independent of his right to collectively-bargained for wages. Thus, a Court can entertain an independent action pursuant to the FLSA, even after a grievance has been filed and processed. The Court noted:

> "Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitrable decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."

Like the minimum wage provisions of the FLSA, we find ERISA's guarantee that an employee shall not be discriminated against in order to deprive him of his pension rights to be a minimum substantive guarantee to individual workers enforceable in a court of law. Scheider v. United States Steel Corporation, 486 F.Supp. 211 (W.D.

Pa. 1980), relied upon by the defendant, is not to the contrary. Scheider was not brought to secure rights protected by § 510 of ERISA but to secure rights protected by a pension plan.

The questions presented by the plaintiffs' suit, involving as they do subtle questions of intent and state of mind, are better decided in court after a full discovery process and with the procedural safeguards provided by normal court procedures. For these reasons, the defendant's motion to dismiss is denied and its motion to stay discovery pending decision of the motion to dismiss is moot.

An appropriate Order will be issued.

Date:3/26/82

[original signed by judge]
United States District Judge

ORDER

AND NOW, this 26th day of March, 1982, upon consideration of Defendant's Motion to Dismiss filed in the above captioned matter on March 4, 1982,

IT IS HEREBY ORDERED that said Motion is DENIED.

[original signed by judge]
United States District Judge

cc: Daniel P. McIntyre, Esquire
Five Gateway Center, Pittsburgh, PA 25111.

Henry J. Wallace, Jr., Esquire
747 Union Trust Building, Pittsburgh, PA 15219.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT GAVALIK, et al.,
Plaintiffs,

vs. Civil Action No. 81-1519

CONTINENTAL CAN COMPANY,
Defendant.

ORDER

AND NOW, this 29th day of July, 1982, upon consideration of Defendant's oral Motion for Reconsideration made at the status conference on March 26, 1982,

IT IS HEREBY ORDERED that said Motion is GRANTED, and finding ourselves in disagreement with Kross v. Western Electric Co., Inc., CA 30 C-5208 (N.D. Ill. Feb. 1, 1982), this court hereby AFFIRMS the Order of March 26, 1982, denying the Defendant's Motion to Dismiss.

[original signed by judge]
United State District Judge

cc: Daniel P. McIntyre, Esquire
Five Gateway Center, Pittsburgh, PA 15222.

James D. Morton and Samuel W. Braver, Esquires
57th Floor, U. S. Steel Building, Pittsburgh, PA
15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT GAVALIK, FRANK GRELO,
JOSEPH URBAN, ANTHONY ULYAN
DONALD CLARKE, HENRY FOSTER,
GEORGE PATTERSON, JOSEPH
KELLERMAN, ROBERT PAVLIK,
PHILLIP FARLEY, THOMAS
RILEY, THOMAS WARREN and
FRANCIS HUMENIK,

Plaintiffs,

vs. Civil Action No. 81-1519

CONTINENTAL CAN COMPANY,

Defendant.

ALBERT J. JAKUB, FRED
CIPRIANI, JR., ANTHONY
J. BERNARDO, THOMAS A. MULLIGAN,
WILLIAM T. TARR, DONALD W.
ROBERTS, ERNEST WIRBECKI,
GEORGE W. STEPANIC,
ALFRED BORELLI, JR.,
ANTHONY FOLINO, THOMAS E. JOHNSTON,

ROBERT KAPOLKA, JOHN C. KINCEL,
PETER A. RUMAIN,
HARRY H. SMITH, MELVIN J.
SMITH, JACK A. STULL,
FRANK A. BLASKO and
JOHN E. KOCZKA, on
behalf of themselves
and others similarly situated,

Plaintiffs,

vs. Civil Action No. 82-1995

CONTINENTAL CAN COMPANY,
a member of
Continental Group, Inc.

Defendant.

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs allege in these consolidated cases that the defendant manipulated plaintiffs' length of employment in order to deprive them of certain pension benefits. Specifically, the parties' collective bargaining agreement provides for the payment of an "early pension" — referred to as the Rule of 65 and 70/75 Plans — in the event of a plant shutdown or permanent layoff. Only those employees who have the 20 years of experience necessary under the Rule of 65 Plan and the 15 years of experience necessary under the 70/75 Plan, combined with an age factor, are eligible for the benefits. Plaintiffs complain that the defendant closed a division of its West Mifflin plant for the purpose of laying off plaintiffs prior to their entitlement to these benefits. Furthermore, the plaintiffs contend that the defendant continued to meet its production needs thereafter by working its employees overtime to avoid calling the plaintiffs back to work.

This action is brought pursuant to § 510 of the Employment Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C. § 1140, which provides that "[i] t shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary...for the purpose of interfering with the attainment of any right to which such participant may become entitled

under [an employee benefit plan.]" The defendant filed motions to dismiss on March 8, 1983, and June 15, 1983, in Civil Action No. 82-1995, which this Court will deny.

In its motion filed on March 8, 1983, the defendant seeks dismissal on various grounds. The first asserted basis for dismissal is that the complaint fails to state a cause of action because the Rule 65 and 70/75 Plans do not fall within 29 U.S.C. § 1140. Without doubt, these plans do fall within the statutory definition of "employee benefit plan." 29 U.S.C. § 1002(3). See also Kross v. Western Electric Co., Inc., 701 F.2d 1241-43 (7th Cir. 1983).

Defendant's second basis for moving for dismissal is that the complaint fails to state a cause of action because ERISA does not preclude consideration of operating costs, including pensions, in the management of a business. This statement of the issue does not accurately reflect the complaint. Plaintiffs are asserting that defendant deliberately followed a plan for avoiding pension liability as a means of increasing its profits, not that it deliberately increased plant profitability by a means that happened to effect employees' eligibility for pension benefits. The former conduct is a violation of ERISA; the latter conduct is not charged by the plaintiffs.

For its next ground for dismissal, defendant raises the plaintiffs' failure to exhaust their remedies. This contention has been previously rejected by this Court in its opinion in Civil Action No. 81-1519, which has since

been consolidated with this case. This Court recognizes that the Seventh Circuit subsequently reached the opposite result in Kross v. Western Electric Co., Inc., 701 F.2d 1238, 1243-45 (1983). Also, this Court is well aware of the Third Circuit's frequent admonitions that "[i]f there is any expression of public policy pertaining to labor-management relations that has emerged loud and clear in today's jurisprudence it is the national policy favoring arbitration of labor disputes." However, after a thorough review of the opinion in Civil Action No. 81-1519, the Kross decision, and Third Circuit law on the arbitrability of labor disputes, this Court reaffirms its decision in Civil Action No. 81-1519 and holds it applicable to its companion case, Civil Action No. 82-1995.

The final ground for dismissal asserted in the first motion is that this action is barred by the statute of limitations. Both parties agree that 29 U.S.C. § 1132 and § 1140 do not provide a specific limitations period and that the appropriate period is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs. Defendant first argues that the Supreme Court decision of DelCostello v. International Brotherhood of Teamsters, — U.S. —, 51 U.S.L.W. 4693 (June 8, 1983) mandates the application of a six-month statute of limitation. Since DelCostello dealt with the statutory limitation to be applied to actions filed after

binding arbitration, it is wholly inapplicable to this case. Defendant's next contention is that the two-year statute of limitations which governs actions for intentional interference with contractual relations is most analogous to this action. This Court disagrees, concluding that the cause of action alleged by plaintiffs is most analogous either to an action charging employment discrimination or a suit alleging breach of a fiduciary duty, both of which are subject to the 6-year residuary period of limitations set forth in 42 Pa.C.S.A. §5527(6). See Knoll v. Springfield Township School District, 699 F.2d 137, 145 (3d Cir. 1983) (appeal pending); Weisen v. Reichett, — F. Supp. —, 111 LLRM 3136 (W.D. Pa. 1982).

The plaintiffs filed suit on September 27, 1982, alleging that discriminatory layoffs of defendant's employees to avoid pension liabilities began in 1976 and continued until the relocation of the pail line in the winter of 1977-1978. From the face of the complaint, the Court is unable to determine whether the discriminatory layoffs of any of the named plaintiffs occurred prior to September 27, 1976. The defendant, as the moving party, has the burden of proving that the statute of limitations bars this action, and defendant has

failed to come forward with evidence to support its contention.[1]

In its second motion, the defendant seeks dismissal for failure to join a necessary or indispensable party; or, in the alternative, joinder of the United Steelworkers of America. Fed. R. Civ. P. 19, which governs disposition of the motion, provides in relevant part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

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[1]The Court has reviewed a pending motion for class certification and found the proposed class poorly defined. The Court recognizes that the issue of when the statute of limitations begins to run may need to be addressed in setting the temporal limitations of any class which may be certified subsequently.

There is no basis for finding either Rule 19(a)(1) or (a)(2) applicable in this case. See also Hodgson v. Board of Education, Parsippany-Troy Hills, 344 F. Supp. 79 (D. N.J. 1972), appeal dism'd, (3d Cir. 1972).

Insofar as the defendant seeks joinder of the United Steelworkers of America pursuant to Fed. R. Civ. P. 14 and 21, it is important to note that a motion for joinder under these rules is not automatic; rather, the decision to permit joinder rests with the sound discretion of the trial court. Judd v. General Motors Corp., 65 F.R.D. 612, 615 (M.D. Pa. 1974). In Judd, the District Court set forth the following three factors for a trial court to consider in determining whether to permit joinder: (1) the timeliness of the motion; (2) whether the filing of the third-party complaint will introduce an unrelated controversy or will unduly complicate the case to the prejudice of the plaintiff; and (3) whether the third-party complaint will avoid circuity of action and settle related matters in one suit. The defendant was served with the complaint in Civil Action No. 81-1519 on September 18, 1981. The defendant filed its motion to join the United Steelworkers of America as a third-party defendant on June 15, 1983, in Civil Action No. 82-1995. Thus, this Court concludes that the motion to join the United Steelworkers of America as a third-party defendant pursuant to Rule 14 and 21 is untimely filed.

An appropriate Order will be issued.

Date: 12/15/83

[original signed by judge]
United States District Judge

cc: Counsel of record.

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the

United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing

for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(Pub.L. 93-406, Title I, § 2, Sept. 2, 1974, 88 Stat. 832.)

§ 1110. Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1150(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart[1] shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a

fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

(Pub.L. 93-406, Title I, § 410, Sept. 2, 1974, 88 Stat. 886.)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any

provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect[1] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary or the Treasury, or

(3) one or more participants, beneficiaries, or fiduciaries, of such plant request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the adminsitrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United

States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan–

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not

intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may asses a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Pub.L.93-406, Title I § 502, Sept. 2, 1974, 88 Stat. 891; Pub.L.96-364, Title III, § 306(b), Sept. 26, 1980, 94 Stat. 1295.)

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No. 85-847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN MASON, *et al.*,

Petitioners,

v.

THE CONTINENTAL GROUP, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS, THE CONTINENTAL GROUP, INC., AND CONTINENTAL CAN, U.S.A., IN OPPOSITION

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QUESTIONS PRESENTED

Respondents, The Continental Group, Inc. and Continental Can Company, U.S.A., believe that the following represent the issues raised in the Petition more accurately than Petitioners' presentation:

I. May employees who feel dissatisfied with the termination of employment ignore the internal review procedures established by their collective bargaining agent (including procedures for review of pension benefits) and proceed immediately to court for alleged violations of the Employee Retirement Income Security Act of 1974 ["ERISA"]?

II. Having failed to pursue their claims through collectively-bargained-for grievance and arbitration procedures, may Petitioners nonetheless assert claims based on their collective-bargaining agreement and associated contracts?

ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

John A. Mason, III; B. J. Banks; Howard Belcher; Jerry Wayne Capps; Phyllis Jean Castillo; Joseph Ceravolo; John Click; James H. Dobbs; Hugh M. Dugger; Robert L. Epperson; Doyle S. Ethridge; Glenn Farrington; B. Lee Fournier; Philip J. Giaveman; Lulian Jaynes; Elmer E. Johnson; Spurgin L. Johnson, Jr.; Margaret Harman; Joe F. Holland; Melvin E. Lacey; Alfred Ronald Land; Willie Edward Lee; Kermit E. Lindsey; Donald R. Maddox; Stella Morris; J. T. Nichols, Jr.; Clarence L. Osburn; Kenneth G. Pitisci; Donald E. Reach; L.G. Robertson; Jimmy C. Robinson; Floyd A. Rowe; J. E. Sellers, Jr.; Lynnes N. Thompson; George D. Tucker

The United Steelworkers of America
The Continental Group, Inc.[1]

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[1]The Continental Group, Inc. has been merged into KMI International, Inc. whose parent companies are: Kiewit Investment Corp., Kiewit U.S. Co., and Peter Kiewit Sons' Inc. Subsidiaries (except wholly-owned subsidiaries) and affiliates of KMI Continental are: Altradec A.G.; Braskraft S.A. Florestal E Industrial; CCC Finanz A.G.; CCL Industries, Inc.; Cobelplast S.A.; Continental Can Company, Inc.; Continental Can Hong Kong, Limited; Continental Can Nigeria Ltd.; Continental Can Saudi Arabia, Ltd.; Continental do Brasil Industria Y Comercio De Embalagens, Ltda.; Continental Participacoes, Limitida; Convertidora Venezolana De Papel, S.A.; De Clerck N.V.; Dominguez & Cia. Caracas S.A.; Dominguez Continental, S.A.; Doosan Continental Can Manufacturing Co., Ltd.; ETS Schuybroek S.A.; Eagle Reinsurance Ltd.; Elbatainer France; Elbatainer (U.K.) Ltd.; Envases Generales Continental De Mexico S.A.; Fabrica Boliviana De Envases; Industrias Del Norte, S.A.; Jeddah Beverage Can Making Co., Ltd.; KMI Merger Corp.; Kuwait Metal Containers Company Ltd.; Metalurgica Matarazzo, S.A.; Nihon Harrison Ltd.; P.T. United Can Company Limited; Qualiplus USA, Inc.; Schmalbach-Lubeca GmbH; Shellmar Embalagem Moderna, S.A.; Sobemi N.V.; Tedeco S.A.R.L.; The Continental Group European

Continental Can Company, U.S.A.

Industries, S.A.; The Risk Management Center (Bermuda) Ltd.; The Vinoxen Company, Inc.; Thomassen & Drijver Verblifa N.V.; Unicon Producing Company; Verblifa N.V. Excluded from this list are corporations in which KMI Continental or its subsidiaries or affiliates have less than a 10% ownership.

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---

BRIEF FOR RESPONDENTS, THE CONTINENTAL GROUP, INC., AND CONTINENTAL CAN, U.S.A., IN OPPOSITION

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported in *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985); the opinion of the district court, in *Mason v. Continental Group, Inc.*, 569 F. Supp. 1241 (N.D. Ala. 1983). Both are included in petitioners' appendix.

JURISDICTION

The proper source of this Court's jurisdiction to review the judgment of the court below is 28 U.S.C. § 1254(1). This opposition is being filed within 30 days of receipt of a copy of

the petition for writ of certiorari and Appendix as revised, in accord with Supreme Court Rule 22.1.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. §§ 1001-1461, in particular §§ 1001, 1022, 1132, 1133, and 1135. The Petitioners have included the text of 29 U.S.C. §§ 1001 and 1132 in their Appendix; Continental includes the text of 29 U.S.C. §§ 1022, 1033, and 1035 in its Appendix along with the text of 29 C.F.R § 2560.503-1, all of which are pertinent to this matter.

STATEMENT OF THE CASE

The present case arises from an Eleventh Circuit affirmance of a district court decision. The district court had dismissed the action of a number of former employees of a can manufacturing plant that had been closed. Certain of those former employees are the petitioners here. The plant was owned and operated by Continental Can Company, U.S.A., the operating arm of The Continental Group, Inc., both respondents here (hereinafter referred to as "Continental").

Although their pension plan, insurance, and collective bargaining agreements with Continental incorporated grievance and arbitration procedures, the employees sought to perfect their claims in court without attempting to exhaust any remedies available via those procedures.

In their petition for certiorari, the employees set forth fourteen pages of alleged "facts" as support for arguments raised before the lower courts. Continental has already

responded to these allegations in briefs filed below[1] and will not burden this Court with a detailed rebuttal of allegations respondents believe are extraneous to the Court's consideration of whether certiorari should be granted in the instant case. Continental does, however, provide a brief factual and procedural overview of this action for background.

This case arises from the closing of a can manufacturing plant by Continental in Fairfield, Alabama, in late 1979. Beginning approximately in the early 1970s, the can-producing industry, of which Continental is a part, experienced a continual decline in business. This decline was caused in part by an evolution from so-called three-piece to two-piece technology, the latter being less costly. Since 1978, the Southern Division of Continental has reduced the number of three-piece can manufacturing plants it operates from seven to two, with a third plant converted over to producing two-piece cans. Four plants in the Southern Division were closed including the Fairfield facility that employed the petitioners. [Paulson Transcript at 28-29, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983)]. [References to the transcripts of depositions are to the last name of the witness.]

All of the petitioners were members of a bargaining-unit of employees represented by the Steelworkers Union at Continental's 411 plant in Fairfield, Alabama. The employees were all covered by a collective-bargaining agreement (hereinafter "Agreement"), insurance plan, and pension plan negotiated on their behalf by the United

---

[1]Respondents have replied to the incomplete and contextually misleading presentation of "facts" by the petitioners in detail in their brief filed before the Eleventh Circuit.

Steelworkers of America, AFL-CIO-CLC[2] (USW), with Continental for plant 411 and other Continental manufacturing facilities. [Record at 19, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983) (hereinafter "R.____").]

These agreements contain detailed provisions covering seniority, wages, layoffs, severance pay, job transfer options in the event of a plant closing and other terms and conditions of petitioners' employment. [R. 19; Agreement, p. 44, § 12.2, p. 46, § 12.5 (f), p. 71, § 25.1, p. 108, § 28.310] [The Agreement page references are to the internal page numbers of the Agreement itself. A copy of the Agreement is attached to page 19 of the record.]

In addition, the Agreement reserves the following management rights to the company:

> Subject to the provision of this Agreement, the Company shall manage the plant, direct the working forces, plan, direct and control the plant operations, hire, promote and demote, discipline, suspend or discharge for just cause, relieve employees from duty because of lack of work and for other legitimate reasons, introduce new and im-

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[2]The Petition for Certiorari lists the USW as a respondent. In the district court, petitioners amended their claim to include the USW as a defendant on September 9, 1981. The USW moved for summary judgment on April 26, 1982. The district court granted summary judgment in the union's favor based on expiration of the statute of limitations. The petitioners made no allegations of district court error in relation to the union in its briefs before the Eleventh Circuit; indeed that Circuit specifically noted that the petitioners were not appealing the district court's dismissal of the cause of action with respect to the union. 763 F.2d at 1222. There is no reference to the union's summary judgment in the argument contained in the Petition before this Court.

> proved production methods or facilities or change existing production methods or facilities, improve quality, reduce costs, and establish and attain reasonable work and production standards.

[R. 19; Agreement, p. 10]

The Agreement also contains a comprehensive grievance procedure:

> 13.1 Purpose
>
> The purpose of this Article is to provide an opportunity for discussion of any request or complaint and to establish a procedure for the processing and settling of grievances, as defined in Section 13.2.
>
> 13.2 Definition
>
> A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with this Agreement respecting wages, hours, or conditions or employment. Any dispute over whether a complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein.

[R. 19; Agreement, p. 49]

And the pension plan contains a clause that makes the grievance procedure applicable to differences arising under it:

> *APPEALS PROCEDURE*
>
> Any differences that may arise between you and the Company concerning your application for your

> entitlement to or the amount of payment of a lump sum retirement allowance, pension or deferred benefit, may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement . . . .

[R. 47]

As part of the company's management of its business in 1976, Continental Can developed and began to use a computerized data base called Bell I that contained basic items of employee personnel information, including seniority date, job classification, and age. The company used a computer program called Bell II to measure the employee costs of its operations on a current and long-term basis. This information was used for current work force management, for strategic planning, and for other business purposes [Rexford Transcript at 44-45, 57-58, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983)].

In September of 1979, Continental announced that it was closing the plant where the petitioners were employed. Company and union representatives met together with each employee individually to review the plant closing provisions of the union contract and to discuss the benefits and options available to that employee. [Middleton Transcript at 30-31 and Newell Transcript at 14-15, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983)] The employees were laid off during October and November, with the plant ceasing operations on December 21, 1979. [Gurley Affidavit, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983) and R. 81]

At no time during this closedown period did any of the petitioners seek review of their concerns under the provisions of the master agreement, the pension plan, and the

insurance plan. [Gurley Affidavit, R. 82; Newell Affidavit, R. 90-91; Middleton Affidavit, R. 39]

After the actual plant closing, some former employees (but not the petitioners) did in fact file grievances concerning their extended benefits. The grievances were handled in accordance with the master agreement and pension plan review process by staff representatives of the union. [Middleton Tr. 43-46]

The former Continental employees who appear before this Court as petitioners, ignoring the grievance and arbitration provisions of their contract with Continental, filed an action on November 26, 1980, with the Equity Division of the Circuit Court of Jefferson County, Alabama.

After the case was removed to the district court for the Northern District of Alabama,[3] the petitioners amended their complaint to add a claim for damages for violations of the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461, on March 18, 1981.

On September 9, 1981, Continental moved for summary judgment on the ground that petitioners had failed to exhaust the grievance and arbitration procedures required by the master agreement, pension plan, and other elements of the collective-bargaining agreement. And on July 27, 1983, the district court granted respondents' motion for judgment, finding that petitioners had failed to exhaust their remedies under the grievance and arbitration procedures of the collective bargaining agreement.

In an appeal to the Eleventh Circuit, petitioners contended that summary judgment was inappropriate. The Eleventh Circuit found that the appeal raised issues as to "(1)

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[3]Jurisdiction was based on the provisions of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).

whether the company's alleged conduct is subject to the collective bargaining agreement, (2) if so, whether plaintiffs should be excused from exhausting remedies provided in that agreement; (3) whether the state law cause of action for breach of fiduciary duty is preempted by the National Labor Relations Act, (4) whether ERISA claims are subject to pension plan appeals procedures; and (5) whether Continental Can was a fiduciary under ERISA and subject to the duties imposed by the Act." *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1221 (11th Cir. 1985).

Addressing the first two issues, the circuit court, citing Article 13 of the master agreement, found that under the collective bargaining agreement in force at the time, claims should have been submitted to arbitration. Because of this finding, the court did not reach the third issue of whether the National Labor Relations Act preempted a state law breach of duty claim. Finally, the court addressed the fourth and fifth issues by analyzing appropriate sections of ERISA and finding that exhaustion of administrative remedies must precede initiation of judicial proceedings. *Id.* at 1221. Thus, the circuit court affirmed the decision of the district court.

For the reasons that follow, this court should not grant certiorari in the instant case.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

A. *Petitioners' First Issue:* The major basis posited by petitioners to support their request that a writ of certiorari issue on the ERISA issue is an alleged conflict between the Eleventh Circuit decision here at issue, *Mason v. Continental Can Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), and the decision of the Ninth Circuit in *Amaro v. Continental Can Company*, 724 F.2d 747 (9th Cir. 1984). Petition at 16-17. Contrary to the allegations of the petitioner, there is

no significant conflict among the circuits on the issue of exhaustion of internal review provisions before commencing a judicial challenge under ERISA. At most there is a split of authority within the Ninth Circuit based on different panel interpretations.

Indeed, the one adverse determination arose in the context of an interlocutory appeal, a context which would itself normally preclude the granting of certiorari by this Court. *E.g., American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1892).

Moreover, even if the Court found a conflict, certiorari would be unwarranted based on the likelihood of elimination of any conflict in fact through the evolving interpretation of the exhaustion question in ERISA litigation by the circuit courts.

Finally, a consideration of the *Mason* decision in light of recent Supreme Court pronouncements, developments in circuit court analysis of the exhaustion issue, and the broad reach of the master agreement and pension plan internal review processes indicates that the lower courts correctly decided the instant case.

Nor can petitioners allege that there is any conflict with Supreme Court pronouncements. Cases like *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), address the effect of an arbitration decision on subsequent judicial proceedings (as opposed to failure to use internal review procedures at all) and focus on the particular statutes under investigation. ERISA, unlike the other statutes considered, specifically requires pension plans to include internal review procedures to handle conflicts. Thus, there is no likely conflict with prior Supreme Court pronouncements.

B. *Petitioners' Second Issue:* The second question presented by the petitioners fails to raise any of the issues that are generally considered grounds for the issuance of a writ of certiorari. Moreover, in their caption petitioners inaccurately characterize the issues they raise in the section as deriving from the Labor Management Relations Act. The first half of the argument (Petition, pp. 29-35) centers around the contracts between the parties; and the second half (Petition, pp. 35-41) raises the issue of preemption by the National Labor Relations Act, an issue that was not reached in the circuit court below.

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONERS' FIRST ISSUE: ELEVENTH CIRCUIT'S HANDLING OF ERISA CLAIMS

A. Contrary to the Allegations of the Petitioners, There Is No Significant Conflict Among the Circuits on the Issue of Exhaustion of Internal Review Provisions Including Arbitration Before Commencing a Judicial Challenge under ERISA.

The major basis posited by petitioners to support their request that a writ of certiorari be granted[4] on the ERISA issue is an alleged conflict between the Eleventh Circuit decision here at issue, *Mason v. Continental Can Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), and the decision of the Ninth Circuit in *Amaro v. Continental Can Company*, 724 F.2d 747 (9th Cir. 1984). Petition at 16-17. In reality, there is

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[4]Rule 17 of the Rules of the Supreme Court is not mentioned by the petitioner but provides an indication of the considerations governing this Court's exercise of discretion in deciding which petitions for certiorari will be accepted. Conflict among the circuits is the only allegation of those mentioned in Rule 17 directly raised by the petition. Respondents address *infra* other allegations arguably implied by the petition.

virtual unanimity among the circuits that the exhaustion doctrine may be applicable to an ERISA-based cause of action where collective bargaining agreements provide grievance and arbitration remedies for pension controversies and where the conflict is between a company and its workers. *Viggiano v. Shenango China Division of Anchor Hocking*, 750 F.2d 276 (3d Cir. 1984) (union members sued for injunctive and monetary relief for employer's alleged violations of fiduciary duties under ERISA; court held that union members had to resort to grievance procedures in first instance rather than to resort to ERISA's judicial remedies); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985) (former employee sued under ERISA for enforcement of rights under unfunded, deferred compensation plan; court found that claims under 29 U.S.C. § 1132(a) that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration); *Kross v. Western Electric Co., Inc.*, 701 F.2d 1238 (7th Cir. 1983) (former employee brought a class action against employer alleging unlawful discharge in violation of ERISA; court found that employees were required to exhaust administrative remedies in pursuing discharge claim).

There are also cases where employees had to exhaust their remedies when they were making claims against trustees of pension plans: *Challenger v. Local Union No. 1 of International Bridge, Structural, and Ornamental Ironworkers*, 619 F.2d 645 (7th Cir. 1980) (employees brought suit against trustees of union-sponsored pension plan alleging that trustees and plan administrators had violated duties under ERISA; court dismissed complaint for failure to submit to arbitration); *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980) (union member sued union under ERISA for a declaration of the parties' rights under a pension plan and for money damages; court found that union member was

required to exhaust his administrative remedies before bringing suit). *Mason* is thus consistent with other circuit court decisions on the propriety of requiring exhaustion in an ERISA context.

Amaro, not *Mason*, is the anomaly, and any real conflict is limited to the Ninth Circuit where *Amaro* is arguably in conflict with *Amato*,[5] a decision by a different panel of the Ninth Circuit.[6]

Petitioners' attempt to characterize one circuit's internal conflict as a conflict among the circuits is without merit. As Justice Harlan wrote, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 552 (1958). *See also Wisniewski v. United States*, 353 U.S. 901, 902 (1957) [dismissal of certificate to the Supreme Court of question on which an

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[5]The Ninth Circuit in *Amaro* attempted to distinguish *Amato* as presenting a claim which the congressionally mandated internal appeal procedures were designed to hear. Amato's action under ERISA was for declaratory judgment of rights and duties under the pension plan, his assertion being that he was entitled to a full pension from the trust but had on numerous occasions been denied. *Amato*, 618 F.2d at 561. However, the decision in *Amato* was not so limited in its approach, finding that, while the text of ERISA nowhere mentions the exhaustion doctrine, both the legislative history and the text of ERISA show that Congress did intend to grant the authority to the courts to apply the exhaustion doctrine and that sound policy requires the application of the exhaustion doctrine in suits under the Act. *Id.* at 566-67.

[6]The panel in *Amaro* included Circuit Judges Kennedy, Skopil and Pregerson, while the panel in *Amato* was composed of Circuit Judges Wallace and Tang and Senior District Judge Hanson (sitting by designation).

earlier panel of the same circuit has rendered a decision ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties." (citations omitted))].

Just as *Amaro*'s contribution to the Ninth Circuit's intramural conflict presumably would not have provided sufficient basis to cause a writ of certiorari to issue had one been requested following the *Amaro* decision, that intramural conflict should not provide the basis for finding an intercircuit conflict.

Moreover, following the Ninth Circuit's issuance of its remand order in *Amaro*, no final decision on remand has, as yet, been issued by the district court. As explained in *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1892), "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *See Youngstown Co. v. Sawyer*, 343 U.S. 579, 584-585 (1951); *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1940); *Hamilton-Brown Show Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1915); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328, (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). Just as a decision pending on remand is not ripe for Supreme Court review, such a decision should not form an independent basis for seeking certiorari.

Even if it were found that a "significant" conflict exists between *Amaro* and the present decision, it is unnecessary to grant certiorari in this case. As described below, the circuit courts' decisions are evolving through the normal case-by-case adjudication process, sharpening the analysis and understanding of when exhaustion is appropriate under ERISA.

For example, in their examination of the relationship between ERISA and exhaustion, the circuit courts have identified the explicit requirements of ERISA concerning the establishment and publication of internal dispute settlement procedures (29 U.S.C §§ 1133, 1022) as a strong justification for requiring exhaustion of such procedures. *See, e.g, Challenger, supra*, 619 F.2d at 649; *Amato, supra*, 618 F.2d at 567 ("It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used."); *Kross, supra*, 701 F.2d at 1245 (quoting *Amato*); *Barrowclough, supra*, 752 F.2d at 939 n. 15 ("Because the Kidder, Peabody plan did not provide for arbitration as an internal appeal procedure of the deferred compensation plan, we need not decide whether arbitration is required in order to exhaust internal remedies under 29 U.S.C. 1133." (comparing *Kross* and *Amaro*)).

Of the federal laws reviewed in the cases principally relied upon by petitioner [*e.g.*, Petition at 18-21],[7] a statutory requirement that internal appeal procedures be established is unique to ERISA. The requirement for internal review strongly supports the general pattern of court decisions (other than *Amaro*) which find utilization of internal review procedures prior to the commencement of a judicial appeal to be a reasonable requirement.

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[7]Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-49 (1974)); the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (*Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 730 (1981)); Universal Military Training Service Act, 50 U.S.C. app. § 459(d) (*McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 266 (1958)); Seaman's Wage Act, 46 U.S.C. §§ 596, 597 (*U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 353 (1971)).

Similarly, building on the Supreme Court's decision in *Schneider Moving & Storage Co. v. Robbins*, 104 U.S. 1844 (1984), the circuits have been examining whether the particular factual setting before them gives rise in an ERISA appeal to the policy concerns that have long undergirded the federal rationale for favoring arbitration. *E.g.*, *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985) (following its interpretation of *Schneider*, the court finds presumption of arbitration does not apply to retirees).

In light of this evolution in circuit court analysis, there is every likelihood that the alleged conflict with the *Amaro* decision will resolve itself in subsequent decisions by the Ninth Circuit.

Finally, when the *Mason* decision is analyzed in terms of the above-mentioned considerations, it is readily apparent that the Eleventh Circuit reached the correct conclusion in requiring exhaustion of the internal review procedures available to the petitioners. *Mason*, which involves a dispute over termination of employment, fits within the classic situation for which arbitration was designed — the promotion of labor peace — as recognized by *Schneider* at 1849. Thus, the presumption of arbitrability should attach to consideration of whether a particular conflict is controlled by the collective bargaining agreement and pension plan. *E.g.*, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). As reviewed in the statement of the case, the master agreement and pension plan between Continental and the petitioners' union contained very broad language as to the issues which would be resolved through the internal review process (*e.g.*, "Any dispute over whether a complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein"). Under well established case law, "when contract language is ambiguous or unclear, a 'healthy re-

gard' for the federal policy favoring arbitration requires that 'any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration.'" *Barrowclough*, *supra*, 752 F.2d at 938 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)). As the allegations made by the petitioners would fit within the broad reach of the internal review provisions, and as ERISA specifically requires internal review procedures for qualifying pension plans, the *Mason* decision requiring resort to the internal review procedures is eminently reasonable and consistent with both Supreme Court decisions such as *Schneider* and the developing case law in the other circuits.

B. Contrary to the Implied Allegations of the Petitioners, the Decision in *Mason* is Not in Conflict with Decisions of the United States Supreme Court.

Petitioners use the Ninth Circuit decision in *Amaro* to indirectly allege violation by the Eleventh Circuit decision of two Supreme Court decisions, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), on the theory that exhaustion of collective bargaining grievance and arbitration procedures is not required in the context of the ERISA allegations before the Eleventh Circuit. There is, however, no conflict between Supreme Court decisions and the Eleventh Circuit decision in *Mason*.

First, in both *Gardner-Denver* and *Barrentine*, the court action arose *after* internal review procedures were utilized.[8]

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[8] "The issue in this case is whether an employee may bring an action in federal district court, alleging a violation of the minimum wage provisions of the Fair Labor Standards Act, 52 Stat 1060, as amended 29 U.S.C. § 201 *et seq.*, after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of his union's collective-bargaining agreement." *Barrentine*, 450 U.S. at 729-730. "Specifically, we must

In contrast, the petitioners in *Mason* failed to utilize the internal review procedures. The question of the effect of the arbitration results—the issue directly before the court in *Gardner-Denver* and *Barrentine*—is not present in *Mason*, as no arbitration ever occurred.[9] Thus, the cases are factually distinguishable.

Moreover, as this Court stated just last year,

> Our rejection of a rule of preclusion in *Barrentine* and our rejection of a rule of deferral in *Gardner-Denver* were based in large part on our conclusion that *Congress intended the statutes at issue in those cases to be judicially enforceable* and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims *under those statutes*.

McDonald v. City of West Branch, 104 S. Ct. 1799, 1803 (1984) (emphasis added).

ERISA is a statute with a statutory purpose and a set of statutory requirements that are both different from those of Title VII and FLSA, the laws involved in *Gardner-Denver* and *Barrentine*.

One of the major statutory differences is that the pension rights are essentially bargained-for rights—*i.e.*, the result of the collective bargaining process where workers are rep-

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decide under what circumstances, if any, an employee's statutory right to a trial de novo under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Gardner-Denver*, 415 U.S. at 38.

[9]There similarly are some circuit court decisions finding no preclusion on ERISA causes of action from an arbitration decision. *See, e.g., Burke v. Latrobe Steel Co.*, 775 F.2d 88 (3d Cir. 1985).

resented by unions. It is in exactly such situations that this Court has traditionally found a strong policy preference in favor of arbitrability. For example, in *Schneider*, this Court repeated the importance of the long-standing federal policy favoring arbitration in a case involving an alleged violation of ERISA. Trustees of two multiemployer trust funds filed separate complaints against employers in the United States District Court for the Eastern District of Missouri, requesting an order for an accounting and immediate payment of all sums thereby determined to be due. Considering whether the presumption in favor of arbitrability applied (and, hence, whether the case should be dismissed for failure to exhaust grievance/arbitration procedures), this Court focused upon whether the relevant agreements indicated an intent on the part of the parties to require arbitration of the dispute and found significant that trustees, rather than employees or the union, had brought the claim.[10] "Before attempting to ascertain the parties' intent from the relevant agreements," the Court in *Schneider* found it necessary to "determine whether the presumption in favor of arbitrability applied in the Steelworkers Trilogy is applicable here." *Schneider* at 1849 (citations omitted). Concerning the presumption in favor of arbitrability, this Court stated:

> That presumption is an accepted rule of construction in determining the applicability of an arbitration clause to disputes between the union and the employer. Such a presumption furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining. *See Steelworkers v. Warrier & Gulf Navigation Co.* 363 US at 578, 582-583, 4 L Ed 2d

[10]The Supreme Court specifically did not address the issue of whether a contractual obligation to arbitrate the dispute would nevertheless have been invalid as a matter of law. *Schneider* at 1851.

> 1409, 80 S Ct 1347. There is, however, less to commend the presumption in construing the applicability of arbitration clauses to disputes between the employer and trustees of employee-benefit funds.
>
> Arbitration promotes labor peace because it requires the parties to forego the economic weapons of strikes and lockouts. Because the trustees of employee-benefit funds have no recourse to either of those weapons, requiring them to arbitrate disputes with the employer would promote labor peace only indirectly, if at all.

Id. at 1849.

In addition to the strong federal policy favoring arbitration on matters admittedly at the heart of labor peace, important statutory considerations within ERISA indicate that there is likely no conflict between the Eleventh Circuit's opinion and Supreme Court precedents. For example, ERISA requires that every employee benefit plan "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied" and "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim" (29 U.S.C. § 1133),[11] and that the plan

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[11]Section 1133 provides that:

> *§ 1133. Claims Procedure*
>
> In accordance with regulations of the Secretary, every employee benefit plan shall—
>
> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by

description, as well as the summary plan description (which must be furnished to participants and beneficiaries), include "the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title)" (29 U.S.C. § 1022(b)).[12]

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the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

[12]Moreover, the Secretary of Labor is granted authority to prescribe necessary or appropriate regulations under ERISA. That authority is established at 29 U.S.C. § 1135 and referred to, *inter alia*, at § 1133, quoted *supra*. Regulations promulgated regarding the "claims procedure" requirements of § 1133 appear at 29 C.F.R. § 2560.503-1. Subsection (b)(2) of that regulatory provision establishes that, "in the case of a plan established and maintained pursuant to a collective bargaining agreement", compliance with the regulatory provisions may be accomplished by incorporating by reference grievance and arbitration procedures of the collective bargaining agreement.

The regulation's acknowledgment of the interrelationship between grievance-arbitration mechanisms of collective-bargaining agreements and the claim procedures under plans covered by ERISA is consistent with the legislative history of ERISA which forges an explicit link between suits under ERISA and suits under section 301 of the Labor Management Relations Act (LMRA). The Joint Explanatory Statement of the Committee of Conference on ERISA says that all actions under ERISA to enforce benefit rights under a covered plan or to recover benefits under the plan "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5038, 5107. As part of the federal common law fashioned by the federal courts under § 301 of the

The statutorily mandated internal review procedures of ERISA, which strongly support the determination reached by the Eleventh Circuit in *Mason*, were not present in *Gardner-Denver* (indeed Title VII creates a specific *external* review process to be used by those aggrieved) or *Barrentine*. *See* discussion *supra* at 17-19.

Indeed, other post-*Schneider* circuit court decisions have found that *Alexander* and *Barrentine* were not violated by a requirement of exhaustion of grievance/arbitration procedures where the "labor peace" principle of *Schneider* was present. *See, e.g., Viggiano, supra*, 750 F.2d at 281 (3d Cir. 1984).

II. PETITIONERS' SECOND ISSUE: ELEVENTH CIRCUIT'S HANDLING OF CONTRACT CLAIMS

The second question presented by the petitioners fails to raise any of the issues that are generally considered grounds for the issuance of a writ of certiorari. Moreover, in their caption petitioners inaccurately characterize the issues they raise in the section as deriving from the Labor Management Relations Act. The first half of the argument (Petition, pp. 29-35) centers around the contracts between the parties; and the second half (Petition, pp. 35-41) raises the issue of preemption by the National Labor Relations Act, an issue

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LMRA, it has been established that where administrative remedies are available they must usually be exhausted by an aggrieved party before his § 301 complaint will be heard. *See, e.g., Buzzard v. Local Lodge 1040 International Association of Machinists and Aerospace Workers*, 480 F.2d 35 (9th Cir. 1973). Equally applicable in the context of ERISA is this Court's observation in *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982), a case under the LMRA, that "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract."

that was not reached in the circuit court below. Continental considers: A) the lack of any basis for certiorari, B) petitioners' first, contractual argument, and C) petitioners' second argument, which was not decided below.

A. Petitioners Offer No Basis for the Granting of a Writ of Certiorari.

Petitioners make no allegations that any element of their second question provides an acceptable basis for granting a writ. There is no allegation of intercircuit conflict, no allegation of an incorrect state-court decision, and no allegation of an important question of federal law. Nor, in this case, could any such allegation be made.

The actual basis for all of the petitioners' arguments in the second section of the petition is their contract, the collective-bargaining agreement with Continental. That contract, part of the record in this case, provides direct evidence of the facts relied upon by the Eleventh Circuit in addressing the issues raised by petitioners. Thus, petitioners' argument in this section represents an attempt to have this Court review the evidence presented below and discuss specific facts related to the contract in question. This Court has said "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Discussing its reasons for granting certiorari, this Court has said, "this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Petitioners do not argue that the issues raised in their second section are important to other parties. They simply maintain that the district and circuit courts erred in their characterization of petitioners' claims.

B. Petitioners' Characterization of Requirement for Exhaustion as Arising under the Labor Management Relations Act is Inaccurate and Misleading.

In the caption that begins their presentation of the second issue raised, petitioners represent that "[t]he courts below erred in holding that petitioners' claims were barred as a result of petitioners' failure to . . . exhaust their administrative remedies under the Labor Management Relations Act." [Petition, p. 29]. This characterization places the decisions of both the district court and the circuit court below in an incorrect and misleading light.

The source of the requirement that the petitioners exhaust their administrative remedies is their contracts with Continental, *not* the Labor Management Relations Act. Section 203(d) of that Act provides in part that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d). This Court has said that the policy articulated in this section ". . . can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960). Thus federal labor policy has evolved to support whatever means are chosen by the parties for resolving their differences. This policy was not challenged by the petitioners below.

The analyses of both courts below focused upon their interpretations of the contracts between the parties. Both courts examined the relevant provisions of the contracts to determine whether or not the petitioners were required to exhaust their remedies before bringing a court action. The

Eleventh Circuit devotes three pages to a close analysis of this issue. *See Mason*, 763 F.2d at 1222-24 (1985). The circuit court concluded that petitioners' claims for alleged fraud are in fact claims for wrongful termination and thus subject to a requirement under the contracts for exhaustion of remedies.

Although the petitioners do not articulate a basis for the granting of a writ of certiorari by this Court, following is a discussion of the argument they present in the first half of their second section [Petition, pp. 29-35].

Petitioners begin by quoting from *United Steelworkers of America v. Warrior Gulf and Navigation Co.*, 363 U.S. 574, 582 (1960): "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Petitioners fail to include additional material from the same paragraph in the opinion, which provides an important perspective: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83.

Petitioners then turn to a case in which the Second Circuit found that a claim against a union that arose under the terms of specific federal labor statutes (§ 303 of the LMRA, 29 U.S.C. § 187, and § 8(b) (4) of the National Labor Relations Act, 29 U.S.C. § 158(b)) fell outside of a collective-bargaining agreement and thus was not subject to arbitration requirements under the contract. *Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584*, 359 F.2d 598 (2d Cir.), *cert. denied*, 385 U.S. 832 (1966). In an astonishing feat of extrapolation, the petitioners formulate a general rule that ". . . a tort claim is not

subject to arbitration unless there is an explicit statement in the collective bargaining contract directing arbitration of a claim for tort damages." [Petition, pp. 31-32]. The petitioners do not actually quote from the opinion when they make this generalization because the court makes no such statement; in fact it makes no direct generalizations about tort claims, nor does it make any statements that could logically give rise to such a generalization.

Petitioners cite *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446 (5th Cir. 1970) because it repeats *Old Dutch's* statement about a Section 303 claim. *Vulcan* also involves a Section 303 claim and does not expand upon *Old Dutch's* limited formulation.

Petitioners would interpret these cases as imposing a requirement on the district and circuit courts in the present case to look for specific mention of tort claims in the contracts between petitioners and Continental. However, in formulating their new unfounded "rule" about all tort claims, the petitioners ignore a broader reading of collective-bargaining agreements that has been supplied by this Court: "[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." *Warrior Gulf and Navigation Co., supra*, 363 U.S. at 581.

Petitioners next argue that the fact that an employee seeks a remedy which can only be secured by litigation ". . . is a fact which courts have considered in holding that the employee was not required to exhaust administrative remedies prior to filing suit." [Petition, p. 34]. Agreement with this statement does not significantly advance the petitioners' case. Petitioners do not provide a strong argument that the remedies they seek are the kind which would justify

the dropping of the requirement for exhaustion of remedies (grievance and arbitration procedures).

Petitioners cite *Brady v. Trans World Airlines, Inc.*, 401 F.2d. 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) in support of this argument. This case actually supports a position opposite to that of petitioners. Mr. Brady had two primary claims: one based on an allegation of a violation of the Railway Labor Act, 45 U.S.C. § 152, and the other on allegations of hostile discrimination on the part of his union. The circuit court found that because he had exhausted the administrative remedies associated with his Railway Labor Act claim, he was free to pursue that claim in court. The circuit also found that he was *not* free to pursue his claim based on hostile discrimination in court because he had failed to exhaust his administrative remedies. Moreover, the court held that this failure to exhaust precluded court access in spite of the fact that he claimed punitive damages and other remedies not available via administrative procedures.

The other case cited by petitioners in support of their claim that the absence of a remedy will sometimes excuse a failure to exhaust administrative proceedings is *Fruit and Vegetable Packers and Warehousemen Local 760 v. Morley*, 378 F.2d 738 (9th Cir. 1967). This case involves intraunion remedies, not remedies between an employer and employees as expressed in a collective-bargaining agreement. The plaintiffs, union members, sought access to union documents that they had a statutory right to obtain. The court found that they could bring their claim for access directly to court because there were no procedures whatsoever for achieving their goal. This is clearly distinguishable from the present case where all admit the existence of grievance and arbitration procedures.

Petitioners conclude the first half of their arguments supporting the second issue with a series of statements that

have to do with statutory interpretation and not contract interpretation: ". . . the company is not required to bargain over its decision to terminate one of its operations." [Petition, p. 34]; ". . . a failure to bargain over a closing is not a violation of the National Labor Relations Act." [Petition, p. 34]; and ". . . a decision to close a plant is not part of the 'terms and conditions' over which Congress has mandated bargaining." [Petition, p. 35].

The Eleventh Circuit placed these assertions in their proper light by pointing out first that the decisions cited by the petitioners all involve questions of statutory interpretation rather than contract interpretation and second, that the petitioners have not based their cause of action on the decision to close the plant but rather on management relations with the petitioners. Those relations are conceptually separate from the plant closing. *Mason v. Continental Group, Inc.*, 763 F.2d at 1224.

C. The Petitioners Conclude Their Petition With An Argument In Support Of An Issue That Was Not Decided By The Court Below.

The arguments on pages 35 through 41 of the Petition address an issue that was specifically not decided by the Eleventh Circuit. The petitioners begin their argument with the statement, "[t]he petitioners' causes of action brought pursuant to Alabama's fraud statutes are likewise not preempted by the National Labor Relations Act." [Petition, p. 35]. In its opinion below, the circuit court did not address any issues of preemption from the state courts. The court mentions specifically the question of "[w]hether the state law cause of action for breach of fiduciary duty is preempted by the National Labor Relations Act", *Mason v. Continental Group, Inc.*, 763 F.2d at 1221. The court indicates that "[s]ince we hold that the claims should have been submitted to arbitration, we need not decide the third point,

whether the state law breach of duty claim is preempted by the Labor Relations Act." *Id.* at 1221. Because the court found that petitioners' claims for fraud should also have been submitted to arbitration, it had no need of addressing the preemption issue in relation to them either. The issue provides no basis for the granting of a writ of certiorari by this Court.

CONCLUSION

For all of the above reasons, there is no merit in any allegation that certiorari should be granted 1) to resolve a conflict between the Eleventh Circuit's decision in *Mason* and another circuit court decision, 2) to review deviation from (or conflict with) the Supreme Court's teachings in cases such as *Alexander* and *Barrentine*, 3) to provide for review of petitioners' contract claims, or 4) to address issues not reached by the circuit court below.

The *Amaro* decision constitutes at most an internal Ninth Circuit division between different panels. Generally, the circuits are in agreement that the arbitration of pension disputes is not precluded under ERISA. Whether exhaustion is appropriate has been decided on the facts of each case. The strong federal policy favoring arbitrability where labor peace is involved, the unique statutory structure of ERISA with its required internal review process, this Court's teaching in *Schneider*, and the very broad internal review language used in the master agreement and pension plan in the instant case all attest to the correctness of the Eleventh Circuit's requiring petitioners to pursue their internal review procedures as provided in their collective bargaining agreements.

Petitioners present no issue of pressing importance that warrants this Court's exercising its discretionary jurisdiction. Accordingly, certiorari on this petition should not be granted.

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APPENDIX

The following statutes and regulation, in addition to those contained in the Petitioners' Appendix, are pertinent to a consideration of the Petition:

Page

STATUTES

29 U.S.C. § 1022 ..... 2a

29 U.S.C. § 1133 ..... 3a

29 U.S.C. § 1135 ..... 3a

REGULATIONS

29 C.F.R. § 2560.503-1 ..... 4a

STATUTES

29 U.S.C.:

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the

provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

§ 1135. Regulations

Subject to subchapter II of this chapter and section 1029 of this title, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title).

REGULATION

29 C.F.R.:

§ 2560.503-1 Claims procedure.

(a) *Scope and purpose.* (1) This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials, hereinafter referred to in the aggregate as "claims procedures." Except as otherwise noted, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

(b) *Obligation to establish a reasonable claims procedure.* Every employee benefit plan shall establish and maintain reasonable claims procedures.

(1) A claims procedure will be deemed to be reasonable only if it:

(i) Complies with the provisions of paragraphs (d) through (h) of this section, except to the extent that it is deemed to comply with some or all of such provisions under the authority of paragraph (b)(2) or paragraph (j) of this section.

(ii) Is described in the summary plan description, as required by § 2520.102-3.

(iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation or processing of plan claims, and

(iv) Provides for informing participants in writing, in a timely fashion, of the time limits set forth in paragraphs (e)(3) and (g)(3) and paragraph (h) of this section.

(2) In the case of a plan established and maintained pursuant to a collective bargaining agreement (other than a plan subject to the provisions of section 302(c)(5) of the Labor Management

Relations Act, 1947 concerning joint representation on the board of trustees):

(i) Such plan will be deemed to comply with the provisions of paragraphs (d) through (h) of this section if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference.

(A) Provisions concerning the filing of benefit claims and the initial disposition of benefit claims, and

(B) A grievance and arbitration procedure to which denied claims are subject.

(ii) Such plan will be deemed to comply with the provisions of pararaphs (g) and (h) of this section (but will not be deemed to comply with paragraphs (d) through (f)) if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference a grievance and arbitration procedure to which denied claims are subject (but not provisions concerning the final and initial disposition of benefit claims).

(c) *Claims procedure for an insured welfare or pension plan.* (1) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for filing of a claim for benefits with and notice of decision by such company, service or organization.

(2) See paragraph (g) regarding review and final decision on denied claims by insurance companies, insurance services and similar organizations.

(d) *Filing of a claim for benefits.* For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A claim is filed when the requirements of a reasonable claim filing procedure of a plan have been met. If a reason-

able procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral communication is made by the claimant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

(1) In the case of a single employer plan, either the organizational unit which has customarily handled employee benefits matters of the employer, or any officer of the employer.

(2) In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the joint board, association, committee or other similar group (or any member of any such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily have been referred.

(3) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, or other similar organization, which is subject to regulation under the insurance laws of one or more States, the person or organizational unit which handles claims for benefits under the plan or any officer of the insurance company, insurance service, or similar organization.

(4) For purposes of paragraphs (d) (1), (2), and (3) of this section, a communication shall be deemed to have been brought to the attention of an organizational unit if it is received by any person employed in such unit.

(e) *Notification to claimant of decision.* (1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

(2) If notice of the denial of a claim is not furnished in accordance with paragraph (e)(1) of this section within a reasonable period of time, the claim shall be deemed denied and

the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section.

(3) For purposes of paragraphs (e) (1) and (2), of this section, a period of time will be deemed to be unreasonable if it exceeds 90 days after receipt of the claim by the plan, unless special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the final decision.

(f) *Content of notice.* A plan administrator or, if paragraph (c) of this section is applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

(1) The specific reason or reasons for the denial;

(2) Specific reference to pertinent plan provisions on which the denial is based;

(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

(g) *Review procedure.* (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such

procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;

(ii) Review pertinent documents; and

(iii) Submit issues and comments in writing.

(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In such case, that company, service, or organization shall be the "appropriate named fiduciary" for purposes of this section. In all other cases, the "appropriate named fiduciary" for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

(3) A plan may establish a limited period within which a claimant must file any request for review of a denied claim. Such time limits must be reasonable and related to the nature of the benefit which is the subject of the claim and to other attendant circumstances. In no event may such period expire less than 60 days after receipt by the claimant of written notification of denial of a claim.

(h) *Decision on review.* (1)(i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

(ii) In the case of a plan with the committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require a further extension of time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

(2) If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the claimant prior to the commencement of the extension.

(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

(i) *Apprenticeship plans.* This section does not apply to employee benefit plans which provide solely apprenticeship training benefits.

(j) *Qualified Health Maintenance Organizations.* Claims procedures with respect to any benefits provided through membership in a qualified health maintenance organization, as defined in section 1310(d) of the Public Health Service Act, as

amended, 42 U.S.C. 300e-9(d), shall be deemed to satisfy the requirements of this section with respect to the provision of such benefits to persons who are members of such qualified health maintenance organization, provided those procedures meet the requirements of section 1301 of the Public Health Service Act, as amended 42 U.S.C. 300e and the regulations thereunder.

SUPREME COURT OF THE UNITED STATES

JOHN MASON ET AL. *v.* CONTINENTAL GROUP, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–847. Decided January 21, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In this case, the United States Court of Appeals for the Eleventh Circuit ruled that beneficiaries of an ERISA plan must exhaust internal plan remedies before suing plan fiduciaries on the basis of an alleged violation of duties imposed by the statute. Although this ruling is consistent with the law of the Seventh Circuit, see *Kross* v. *Western Electric Co.*, 701 F. 2d 1238 (1983), it is at odds with a decision of the Ninth Circuit, *Amaro* v. *Continental Can Co.* 724 F. 2d 747 (1984), which held that plaintiffs alleging a statutory violation (as opposed to a mere denial of benefits owing under an ERISA plan) need not exhaust internal remedies.* The Third Circuit has noted the existence of this conflict but failed to take a direct position on it, see *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F. 2d 923, 939, n. 15 (1985), although that court's acceptance of the notion that statutory ERISA claims are normally not arbitrable seems to reflect agreement with the Ninth Circuit's approach. See *id.*, at 941.

I believe that the Court should grant certiorari in this case in order to resolve the uncertainty over the existence of an exhaustion requirement in cases of this kind. The increasing

*Cf. *Amato* v. *Bernard*, 618 F. 2d 559 (CA9 1980) (adopting exhaustion requirement where beneficiary merely seeks benefits due under the terms of an ERISA plan).

significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket; in a field so productive of federal litigation, the need for clear procedural rules governing access to the federal courts is imperative. Moreover, because the coverage of particular ERISA plans frequently extends to beneficiaries in more than one state—and, no doubt, in more than one judicial circuit—differences in the rules governing access to federal court for the purpose of pressing a claim under ERISA may have the troubling effect of encouraging forum-shopping by plaintiffs. Accordingly, the conflict among the circuits over the issue of an exhaustion requirement under ERISA can hardly be passed over as an unimportant one unworthy of this Court's attention. I therefore dissent from the denial of certiorari.